82-5590

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Michael Sandler
(Counsel of Record)

Charles G. Cole
Rebecca L. Hudsmith
Diane F. Orentlicher

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether, consistent with the Sixth, Eighth and Fourteenth Amendments, a defendant in a capital case may be denied access to grand jury testimony of the State's two principal witnesses, who have made prior exculpatory and inconsistent statements, and whose trial testimony will provide the basis for both the determination of guilt and the requested sentence of death?

2. Whether the court below erred in believing that the U.S. Constitution requires that a defendant whose jury has recommended life imprisonment be sentenced to death in order to achieve "consistency" with a co-defendant's death sentence?

3. Whether exclusion of evidence of a defendant's "rehabilitative capacity" may be viewed as harmless error in light of the Eighth and Fourteenth Amendments where the judge, notwithstanding a jury recommendation of life, has sentenced the defendant to death?

4. Whether, consistent with the Eighth and Fourteenth Amendments, a sentencing judge may override a jury's recommendation of life imprisonment in a capital case -- at least where a statutory mitigating circumstance has been established?

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The opinion and judgment of the Supreme Court of Florida is reported as Miller v. State, 415 So.2d 1262 (Fla. 1982), and appears in the Appendix ("App.") at 1a. The trial court in Florida did not issue a formal opinion. The judgment of the trial court, its order denying petitioner access to certain grand jury transcripts, a transcript of the trial court's sentencing determination and the trial court's Findings in Support of Sentences are reproduced. App. at 5a et seq.

JURISDICTION OF THE COURT

The Supreme Court of Florida issued its opinion and judgment in this case on March 25, 1982. App. at 1a. On July 22, 1982, the Supreme Court of Florida by written order denied petitioner's timely motion for rehearing. App. at 4a. Petitioner filed a timely application, on September 8, 1982, for an extension of time in which to file a petition for writ of certiorari, and Justice Powell on September 9, 1982, ordered that the time for filing this petition be extended to and including October 20, 1982. Ernest Lee Miller v. Florida, No. A-256 (Sept. 9, 1982).

The jurisdiction of this Court is conferred by 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . . .

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in pertinent part that no State shall:

> deprive any person of life, liberty, or property, without due process of law . . . .

Florida Statutes § 905.27(1) concerning access to grand jury testimony; § 90.801(2)(a) concerning the evidentiary effect of prior sworn statements; and § 921.141 setting forth Florida's death sentencing criteria and procedures are reproduced in the Appendix to this petition. App. at 28a et seq.

STATEMENT OF THE CASE

Petitioner Ernest Lee Miller was convicted on November 15, 1979, of first degree murder of an unidentified victim referred to in the indictment only as "Tammy." Following a separate sentencing hearing, the jury that had convicted petitioner recommended a sentence of life imprisonment. Petitioner's co-defendant and older half-brother, William Riley Jent, was separately tried and then convicted of first degree murder. Jent, however, received a jury recommendation of death. In a combined sentencing order, the judge who had presided at both trials sentenced petitioner and his co-defendant to death.[1/] In overriding the jury recommendation of life imprisonment for petitioner, the trial judge relied on the heinous nature of the crime and a perceived constitutional need to avoid disparate sentences between co-defendants.

The Trial

The State's case on guilt -- and on the requested death penalty -- centered on the testimony of two women, Glinna Frye and Carlena Jo Hubbard, who said they participated in events leading to the crime. If the testimony of these two women is to be credited, sometime on the night of July 12, 1979, a woman known only as "Tammy" was beaten, transported to the Richloam Game Preserve, doused with gasoline and burned by petitioner and his co-defendant Jent

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1/ Jent's conviction and sentence were upheld on appeal. Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied on other issues, 102 S. Ct. 2916 (1982).

while a group of approximately seven people -- the State's two principal witnesses among them -- stood by and watched.

Prior to trial, petitioner moved to compel production of the grand jury testimony of both witnesses, as well as of a third person who did not ultimately testify. (R. at 215-17).[2/] In support of the motion, petitioner noted that the individuals were alleged eyewitnesses and cited deposition testimony that the two women had told significantly different versions of the events -- including statements that they had not witnessed any killing. He also cited the State's promises of leniency in exchange for their testimony. In response, the State said petitioner was on a "fishing expedition" and cited the general need for secrecy of grand jury proceedings. (R. 2132-34). The trial judge denied the motion to produce and, despite petitioner's request that he do so, also refused to review in camera the transcripts of the grand jury testimony. (R. at 2138). The only reason given for the denial was that a proper "predicate" (showing of need) had not been made. App. at 5a. Petitioner thus did not have the benefit of the transcripts at either the trial or the sentencing hearing.

At trial, Frye admitted that, on two different occasions during the day of July 12, 1979, she had injected into her veins a hallucinogenic drug known as "Crystal T." (R. at 1343-44, 1346). Similarly, Hubbard testified that on the night of July 12, 1979, she had been "pretty totaled" as the result of heavy alcohol consumption. (R. at 1207). Both women admitted as well to having told police authorities several different versions of what had happened on the night of July 12, 1979. Frye testified that she initially told police

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2/ Citations to "R." are to the record on appeal to the Supreme Court of Florida.

authorities that there was no killing. (R. at 690). After she was arrested, she told police authorities that she did not see or know anything. (R. at 699). In exchange for her testimony at trial, the State agreed to drop the charge of accessory after the fact to murder in the first degree that had been lodged against her. (R. at 1340). On the eve of trial, Frye informed the State's attorney for the first time of her latest version of the events occurring on the night of July 12. In a proffer by the State, she claimed to have witnessed petitioner, the co-defendant Jent, and two other men rape the victim at petitioner's house prior to the burning at the game preserve. Because this information was wholly inconsistent with Frye's prior statements and, therefore, came as a surprise to petitioner, Frye's testimony concerning the alleged rape was excluded from the guilt phase of the trial. (R. at 1302).[3/]

When the second witness, Hubbard, first talked to police authorities, she denied knowledge of the events. (R. at 1207-08). Hubbard later told authorities that a group had been partying on the river, but that petitioner did not kill anyone. (R. at 1208). Only after the police threatened to charge her with murder or accessory, did Hubbard agree to testify against petitioner. (R. at 1209-10). Hubbard did not testify, however, that a rape had occurred. To the contrary, she stated that the group stopped at petitioner's house for only a few seconds prior to going to the game preserve. (R. at 1188, 1199).

The State did not offer any evidence of fingerprints, tire tracks, fingernail scrapings, or hair samples linking petitioner to the crime, although petitioner's fingerprints

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3/ At the sentencing stage of the trial, Frye was allowed to testify regarding the alleged rape. (R. at 1551-52).

were taken; tire tracks found at the site of the body were photographed (R. at 1077-78); scrapings were taken from underneath the victim's fingernails (R. at 1135); and hair samples were taken from petitioner (R. at 135). Nor did the State offer any evidence directed to the identity of the victim, although the victim's fingerprints were taken. (R. at 1116). The defense rested after the close of the State's case in chief without putting on any evidence. (R. at 723). The jury returned a verdict of guilty of murder in the first degree. (R. at 356).

In a motion for new trial filed prior to sentencing by the trial court, petitioner urged the existence of newly discovered evidence. (R. at 425-26). In support of the motion, petitioner filed the affidavits of two people, Elmer Carroll and Tina Marvin, who claimed to know the identity of the victim "Tammy" and the identity of her murderer. (R. at 524-27). According to these affidavits, "Tammy" was in fact a woman named Gail Bradshaw and her murderer was her boyfriend of four years, Boddy Dodd. Carroll stated in his affidavit that he witnessed Dodd beat and burn Gail Bradshaw at the Richloam Game Preserve on the night of July 12, 1979. (R. at 526-27). Tina Marvin, Carroll's girlfriend, stated in her affidavit that Carroll told her about the murder he had witnessed. (R. at 525).

At an evidentiary hearing on the motion, Gail Bradshaw's brother testified that the burned victim shown in a photo looked like his sister. (R. at 1837). Gail Bradshaw's sister testified that several pieces of jewelry found on the body of the victim were just like her sister's jewelry. (R. at 1853-54). Carroll and Marvin recanted that part of their

affidavits detailing the murder of Gail Bradshaw,[4] but testified that they had last seen Gail sometime around July 12, 1979 (R. at 1864, 1876-77, 1933); that they left town almost immediately after they heard of the discovery of the burned body (R. at 1863, 1940); and that they had on several occasions heard Bobby Dodd threaten to kill Gail Bradshaw (R. at 1879, 1932). The trial judge denied the motion for new trial. (R. at 545-46).

The Sentencing Proceedings

At the separate sentencing hearing before the jury on November 16, 1979, on the issue of the penalty to be imposed, defense counsel presented mitigating evidence that petitioner was 23 years old (R. at 1573); that he was married and had two children (R. at 1573); that he had no prior criminal record (R. at 1573); and that he had used drugs on the night of July 12, 1979 (R. at 1318, 1599). In addition, he presented the testimony of a clinical psychologist, Dr. Sidney Merin, regarding significant aspects of petitioner's psychological makeup. In particular, Dr. Merin testified:

> Mr. Miller is basically a dependent personality. He continuingly and unfavorably judges himself in relation to stronger people around him. If that stronger person is a favorable, community oriented individual, he'll take over those characteristics. If those

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4/ Elmer Carroll gave as his explanation for the statements in his affidavit petitioner's promise, made while the two were incarcerated together, to protect Tina and to supply Elmer with reefers. (R. at 1889-91). However, Carroll admitted on the stand that, while in police custody immediately prior to the hearing, he was told that if he did not change his story he could be charged with perjury, murder, or accessory to murder. (R. at 1914-15). Tina Marvin testified that she signed the affidavit to help out (R. at 1952), but also admitted that she was afraid that if she told her story about Gail she would get in trouble and lose her baby. (R. at 1964).

> stronger persons are unfavorable and destructive, he will take on those characteristics. He is basically not certain of how much of a man he is and he can be thought of in some respects as being kind of a chameleon, he'll take on the shading and coloration of whatever happens to be around him. We might even say that he is a shadow of an individual who is looking around for some object to attach the shadow to.

(R. at 1590-91). Dr. Merin concluded that, separate and apart from other individuals, Mr. Miller does not have a violent nature. (R. at 1591). However, due to petitioner's weak and inadequately developed ego, he acts under the domination of stronger persons. (R. at 1590). Dr. Merin also testified that drug use could further diminish petitioner's decision-making power. (R. at 1597).

In addition to the testimony regarding petitioner's psychological tendencies, defense counsel attempted to present in mitigation Dr. Merin's testimony regarding petitioner's rehabilitative capacity. However, the trial court refused to allow the testimony, finding that rehabilitative capacity did not fall within any of the express mitigating circumstances set forth in the Florida death penalty statute. (R. at 1545-46, 1567-68).

Based on the mitigating evidence the trial court did allow, defense counsel urged the applicability of four of the mitigating factors under Florida's death penalty statute, Fla. Stat. Ann. § 921.141(6) (R. at 1623-25). The jury returned a recommendation that petitioner be sentenced to life imprisonment. Under Florida law, the jury was not required to make written findings of what aggravating and mitigating circumstances it found to exist. However, the jury did specifically report that it had reached its recommendation after deliberating and weighing the mitigating and

aggravating circumstances under the Florida sentencing statute. (R. at 1643).

In a joint sentencing proceeding two months later, the trial judge sentenced both the petitioner and the co-defendant Jent to death, thereby overriding petitioner's jury recommendation of life imprisonment. App. at 22a-24a. The trial judge found as aggravating circumstances that the murder was especially heinous, atrocious, or cruel, and that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. App. at 11a-12a, 20a-21a. However, the court concluded that, because of the overlap between these two aggravating circumstances, it would consider them as one aggravating circumstance. Id.

The only mitigating circumstance that the court found to apply to petitioner was the absence of any significant history of prior criminal activity. While recognizing that the jury may have been "emotionally impressed" by Dr. Merin's pyschological testimony, the court rejected the testimony of Dr. Merin as contrary to the evidence that petitioner's participation in the crime was equal to that of his older half-brother, Jent. Compare App. at 13a with 21a-22a. Focusing on its finding that the co-defendants participated equally in the crime, the court concluded:

> The United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency. [citations to Proffitt and Furman]
>
> The jury for the defendant Jent has recommended death and this court finds that the weight of the aggravating and mitigating circumstances demand death sentences for both defendants.

> Therefore, if the recommendation of the jury for the defendant Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences. It would cause a hollow ring in the Florida halls of justice if the sentences in these cases were not to be equalized.

App. at 24a. In light of the court's perceived need for consistency in the imposition of the death penalty where there is no substantive difference in the participation -- as opposed to the character -- of each co-defendant, the court overrode the jury recommendation of life and sentenced the petitioner to death.

The Appeal

On direct appeal to the Supreme Court of Florida, petitioner urged that the trial court's denial of his request for the grand jury testimony of the State's two eyewitnesses violated his Fifth, Sixth, and Fourteenth Amendment rights. (Appellate Brief at 8-10). Petitioner also claimed that his sentence to death was unconstitutional. Petitioner alleged that the trial court, contrary to this Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), unconstitutionally restricted the mitigating factors that could be considered by the jury when it refused to allow the psychologist to testify at the sentencing hearing regarding petitioner's rehabilitative capacity. (Appellate Brief at 39-41). Petitioner also claimed that the trial court erred in relying on evidence presented in Jent's trial in sentencing petitioner to death. (Appellate Brief at 48). In addition, petitioner claimed that the trial court wrongly overrode the jury recommendation of life by its failure to consider the mitigating circumstances that the

jury must have found to have existed in recommending life over death. (Appellate Brief at 47-49).

The Supreme Court of Florida rejected petitioner's contentions in their entirety and affirmed his conviction and sentence of death. Miller v. State, 415 So.2d 1262 (Fla. 1982); App. at 1a. Regarding the trial court's refusal to allow the psychologist to testify as to petitioner's rehabilitative capacity, the Supreme Court found no reversible error, since "[t]he effectiveness of the psychologist's testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment." 415 So.2d at 1263; App. at 2a. The Supreme Court failed to acknowledge, however, that petitioner was ultimately sentenced to death by the trial judge, who neither heard nor considered the mitigating evidence regarding rehabilitative capacity.

Regarding the sentence itself, the Florida Supreme Court approved the trial court's override of the jury's recommendation of life so as to achieve consistency with the co-defendant's death sentence:

> In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime. Notwithstanding the jury's recommendation, he found that Miller clearly deserved the death penalty. Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational, consistent manner, the court also found that following the recommendation of Miller's jury would result in an unwarranted disparity in sentences.

Id. at 1263; App. at 2a.

Two justices dissented. In noting the differences in the evidence for the co-defendants that would support disparate sentences, the dissent stated:

> By its recommendation, the jury obviously considered [the psychologist's] testimony and found Miller deserving of some mitigation of sentence. The defense presented no such evidence at Jent's sentencing proceeding, and I find that the evidence presented in the two sentencing proceedings justified the respective jury recommendations.
>
> It appears to me that the trial judge felt that the circumstances of this homicide were so egregious that they overwhelmed any other consideration. Still, there was but one real aggravating circumstance (cruel, atrocious and heinous) and one admitted mitigating factor (no prior criminal record). The evidence is also susceptible of a finding that this defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Id. at 1264, App. at 3a.

The Supreme Court of Florida denied Mr. Miller's petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION

In any federal criminal trial, a defendant is entitled to transcripts of the grand jury testimony of government witnesses. The right was recognized in Dennis v. United States, 384 U.S. 855 (1966), and subsequently codified by amendment to the Jencks Act. 18 U.S.C. § 3500(e)(3). Although this Court has not required, as a matter of constitutional right, that defendants be afforded grand jury transcripts in criminal proceedings, its decision in United States v. Augenblick, 393 U.S. 348, 356 (1969), suggested that, in a proper case, the failure to produce a prior statement of a prosecution witness in a state criminal proceeding may violate the Sixth Amendment. The Court has not addressed the issue since Augenblick and has never addressed the issue in the context of a defendant charged with a capital offense. Cf. Brady v. Maryland, 373 U.S. 83 (1963) (holding that a state has the constitutional duty, under the due process clause, to disclose material evidence favorable to an accused). Nor has the Court addressed the Eighth Amendment aspects of withholding grand jury testimony that bears on evidence forming the basis of a death sentence.

1. Petitioner, charged with first degree murder, based his defense upon the lack of credibility of Glinna Frye and C.J. Hubbard, the two eyewitnesses against him. Their testimony was central to the State's case and demand

for the death penalty, but both had made unsworn and inconsistent statements to the police, including an exculpatory statement that they had not witnessed any killing. (R. at 690, 693-94, 699-700, 1207-10, 1553). Both had reason to fear that they could be prosecuted for their own roles. (R. 693-94, 1208).[5/] They appeared before the grand jury under oath at a time when the events in question were fresh in memory.

Prior to trial, petitioner's counsel moved for production of transcripts of the grand jury testimony of the State's two central witnesses (Frye and Hubbard), as well as of a third person who did not testify at trial. (R. at 215-17). The motion recited deposition testimony showing that the two witnesses in question had previously given different versions of the events, and that one had acknowledged receiving promises of leniency from the State in return for her testimony in this case. (R. at 216). The motion also recited the necessity of the transcripts to assure rights of due process and effective confrontation of witnesses under the United States Constitution. (R. at 217).[6/]

In response, the State claimed that the defense was on a "fishing expedition" and cited the generalized interest in grand jury secrecy. (R. at 2132-35). During argument on the motion, petitioner's counsel requested that

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5/ Frye at one point was arrested as an accessory after the fact, while Hubbard was in protective custody when she first told the story she recounted at trial.

6/ Moreover, grand jury testimony in Florida differs from other witness statements. Like Federal Rule Evidence of 801(d)(1) on which it is modeled, the Florida statute exempts prior sworn statements from the hearsay rule. Fla. Stat. Ann. § 90.801(2)(a). Thus, prior grand jury testimony can be considered by the jury for the truth of the matter asserted.

the trial court at least review the transcripts in camera before denying the motion. (R. at 2130-32). The court denied the motion saying only that "a sufficient predicate" (showing of need) had not been made. (R. at 2138); App. at 6a.

Ultimately, the State's case on both guilt and sentencing derived from the testimony of the two witnesses concerned. Indeed, the aggravating factor on which the trial court based petitioner's sentence of death under Florida's death penalty statute (heinous crime) was supported solely by testimony from the two witnesses in question.

The Florida Supreme Court summarily affirmed the decision to withhold the grand jury transcript, based on its reasoning in an appeal by petitioner's co-defendant. Miller, 415 So.2d at 1263 & n.3 (citing Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied on other issues, 102 S. Ct. 2916 (1982)). In Jent, the Florida court ruled (a) that the defendant had failed to lay a "a proper predicate" for the testimony based on something other than surmise about the testimony's contents, and (b) that the defense's subsequent attack on the credibility of the state's witnesses by cross-examination "obviated that need for their prior [grand jury] testimony." Jent, 408 So.2d at 1027-28.

The ruling below places a defendant in a capital case in an untenable position: in order to persuade the judge to produce the grand jury transcripts, the defendant effectively must demonstrate some inconsistency between a witness' other statements and grand jury testimony -- but the defendant cannot possibly do so because the grand jury testimony is secret. This obstacle has rarely been

surmounted in Florida, particularly in capital cases.[7/] Florida's requirement of showing an actual conflict between current statements and grand jury testimony as a "predicate" for access to a grand jury transcript thus effectively denies defendants any reasonable hope of obtaining potentially relevant and material evidence in their defense. See Jencks v. United States, 353 U.S. 657, 666-68 (1957).

2. There is a conflict among the states as to whether a defendant in petitioner's position could have obtained comparable grand jury testimony in these circumstances. Twenty states afford a broad right to such testimony; seven deny access in most instances; in fourteen others (including Florida), some particular need or other showing must be made; and, as for the others, we have not ascertained a controlling decision or statute. See App. at

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7/ A review of the decisions listed in the annotation to Fla. Stat. Ann. § 905.27 shows that Florida appellate courts have not reversed a trial court's denial of access to grand jury testimony in a capital murder case in at least 40 years. The Florida Supreme Court last set aside a refusal of defense access to a grand jury transcript in any criminal case 24 years ago. Gordon v. State, 104 So.2d 524, 536-37 (Fla. 1958). Conversely, the last appellate affirmance of a Florida trial court order for in camera judicial inspection of a grand jury transcript occurred in 1969. State v. Drayton, 226 So.2d 469 (Fla. App. 1969).

During the past quarter-century, Florida appellate courts have denied defendants access to grand jury transcripts more than 15 times, including 7 first degree murder cases. In addition to petitioner's case, the decisions involving first degree murder charges include Jent v. State, 408 So.2d at 1027-28; Domeq v. State, 336 So.2d 405 (Fla. App. 1976) (per curiam); State v. McArthur, 296 So.2d 97 (Fla. App. 1974); Williams (Charles) v. State, 275 So.2d 284 (Fla. App. 1973) (per curiam); Williams (Katherine) v. State, 271 So.2d 810 (Fla. App. 1973) (per curiam); State v. Gillespie, 227 So.2d 550 (Fla. App. 1969). Notably, in McArthur, the trial court dismissed the indictment because the grand jury testimony had not been recorded, while the appellate court held that such testimony need not be recorded. Gillespie held that the trial court abused its discretion in ordering an in camera inspection of grand jury transcripts in response to a general request for evidence containing expulpatory or impeachment statements.

32a. Since, as noted below, the access to such testimony can affect the basis on which a death penalty is imposed, this conflict bearing on fundamental Eighth Amendment rights should be resolved.

3. While the Constitution may not guarantee an ordinary criminal defendant access to grand jury transcripts of his chief accusers, this Court has recognized that different considerations apply where the ultimate penalty of death might be imposed -- and where the Eighth Amendment therefore comes into play. While reviewing courts usually may not examine the severity of the sentence imposed by a trial court, Rummel v. Estelle, 445 U.S. 263, 274-75 (1980), this Court has closely scrutinized both statutory sentencing schemes and individual sentencing proceedings in death penalty cases. See Eddings v. Oklahoma, 102 S. Ct. 869 (1982). This close scrutiny reflects the unique nature of capital punishment which creates a correspondingly unique need for reliability in the determination that death is the appropriate penalty in a particular case. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion of the Chief Justice); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion of Justice Stewart).

These Eighth Amendment considerations apply to the determination of guilt or innocence of a defendant charged with a capital offense -- and certainly to the proof of any aggravating factor on which the subsequent death sentence is based. Cf. Gardner v. Florida, 430 U.S. 349, 359 (1977) (holding that the trial court may not refuse to withhold a presentence report that provides a partial basis for imposing the death penalty). In Eddings v. Oklahoma, this Court stated:

> Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence.

102 S. Ct. at 875-76. In this case, the trial court has prevented a defendant from presenting to the sentencer (jury and sentencing judge) evidence potentially relevant to the other side of the sentencing equation -- the aggravating factors relied on by the State. By erecting a nearly insurmountable barrier between grand jury transcripts and defendants facing a death penalty, the Florida courts have precluded such defendants from making one type of challenge to the evidence asserted in support of death.

4. Sixth Amendment issues are raised by the decision below as well. See Palermo v. United States, 360 U.S. 343, 362-63 (1959) (Brennan, J., concurring)[8/] The only reason the state offered for opposing petitioner's request for access to the grand jury transcript was its generalized interest in grand jury secrecy. By contrast, the defendant in a capital case has the most compelling interest imaginable in testing the credibility of the witnesses against him -- his life. This Court previously has held that a state's generalized interest in the secrecy of juvenile court records does not outweigh a burglary defendant's Sixth Amendment right fully to test the credibility of the chief prosecution witness. Davis v. Alaska, 415 U.S. 308 (1974). The Constitution cannot afford less protection to a defendant in a capital case, where the stakes are so much higher.

8/ Fifth Amendment issues would be raised if the grand jury transcripts in fact contained exculpatory material. Brady v. Maryland, supra. The two witnesses here had made prior exculpatory statements.

Two cases to be heard this Term will decide whether, and under what circumstances, the Internal Revenue Service may obtain grand jury materials for use in civil tax investigations. United States v. Baggot, 102 S. Ct. 2955 (1982); United States v. Sells Engineering, Inc., 102 S. Ct. 2034 (1982). In both cases, the government has asserted an absolute right to use these materials. It would be tragically incongruous for the government to be allowed unlimited access to grand jury testimony in tax cases while a state criminal defendant was put to death after being denied the same type of testimony.

5. The present case raises the Eighth and Sixth Amendment issues in a narrow context. The evidence on which petitioner's death sentence was based -- as well as the evidence linking him to the underlying crime -- were derived from the two eyewitnesses whose grand jury testimony was sought. Both witnesses had admitted to giving exculpatory and inconsistent statements concerning the events. Both had been promised leniency in exchange for their testimony.[9/] In order to make clear that access to grand jury testimony should be afforded when a defendant faces a possible death sentence based on this type of evidence, the petition for certiorari should be granted.

9/ A "particular need" for the testimony was thus clearly made. Compare Dennis v. United States, 384 U.S. at 868-74, with United States v. Youngblood, 379 F.2d 365, 369-70 (2d Cir. 1967).

II. THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY

1. Petitioner's death sentence was predicated on a factor not mentioned in Florida's death penalty statute -- a perceived constitutional requirement from this Court's decisions that petitioner's sentence should be "consistent" with the death sentence of a co-participant in the same crime. The co-participant (petitioner's older half-brother) had received an advisory sentence of death from his jury, while petitioner's jury had recommended life. Under the Florida statute approved in Proffitt v. Florida, 428 U.S. 242 (1976), cf. Gardner v. Florida, 430 U.S. 349, 354 (1977), both the advisory jury and the sentencing judge were to consider certain "aggravating" and "mitigating" factors. The judge found that one aggravating factor (heinous crime) and one mitigating factor (no prior arrests or convictions) were established in petitioner's case. He also noted that the jury had apparently relied on other mitigating evidence.[10/] Yet, there was another factor which helped form the judge's sentence. Citing Proffitt and Furman v. Georgia, 408 U.S. 238 (1972), the trial court reasoned that since the death penalty had to be consistently applied, petitioner's sentence should be equalized with the death sentence of the co-participant in the murder: "[I]f the recommendation of the jury for . . . Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences." App.

10/ Both the judge and the two dissenting justices on the Florida Supreme Court cited psychological testimony that petitioner was a "social follower," had a weak ego, and was whatever his environment happened to be around him. App. at 3a, 13a and 21a.

at 24a. As the Florida Supreme Court opinion indicates, the need to equalize the two defendants' treatment affected the trial court's ultimate result:

> In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime . . . . Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational consistent manner, the Court also found that following the recommendation of Miller's jury would result in unwarranted disparity in sentences. He therefore sentenced both defendants to death, finding that the mitigating evidence did not outweigh the evidence proved in aggravation.

App. at 2a-3a.

This perceived constitutional "demand" to avoid a disparity in the two sentences was thus a crucial non-statutory "factor" in the sentencing calculus. The decision below profoundly misinterprets the "consistency" requirements of Furman v. Georgia, 408 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976), and essentially disregards the requirement that full consideration be given to the individual characteristics of each defendant under Lockett v. Ohio, 438 U.S. 586 (1978). This issue as applied to co-defendants has not been addressed previously by the Court.

2. The Court has never stated that "consistency" itself is an overbrooding factor that is to be independently applied in capital sentencing proceedings -- beyond the specific factors in the relevant state statute. To date, the concept of overall consistency has been used only as a measuring rod. In this regard, the relevant question has been whether a state's sentencing procedures and criteria result in the death penalty being imposed in a capricious or freakish manner. See Gregg, 428 U.S. at 188-89 (plurality opinion.) To satisfy the general requirement of consistency,

the sentencing statute need only specify objective criteria that provide adequate guidance to the sentencing authority:

> In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance.

Id. at 195.

Moreover, nothing in Furman or Gregg suggested that the concept of "consistency" required the adjustment of a life sentence to death -- an inverse of normal proportionality review -- or that the death penalty should be imposed where the particular circumstances and character of the defendant may indicate that mercy is appropriate:

> Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id. supra, at 199.

Proffitt certainly cannot be read to require imposition of death in pursuit of consistency. The Proffitt plurality noted that the constitutional standard of consistent sentencing results was satisfied by the Florida statute's provision directing the sentencing authority "to weigh eight aggravating factors against seven mitigating factors to determine whether the death penalty shall be imposed." Proffitt, 428 U.S. at 251.

The Court then cited with approval the Florida Supreme Court's statement that it would compare each death sentence with other cases to "determine whether or not the punishment is too great." Id. (quoting State v. Dixon,

283 So.2d 1, 10 (Fla. 1973) (emphasis added)). The courts below failed to appreciate that Florida's appellate review procedure was approved in Proffitt because it protected individual defendants against the risk of an improper death sentence -- not because it achieved an inflexible consistency in all cases, and certainly not because it would eliminate the "risk" of an erroneous grant of life. Significantly, the review procedure approved in Proffitt provides for automatic appellate review only where the sentence imposed is death. Fla. Stat. Ann. § 921.141(4), App. at 29a. There is no similar automatic review of life sentences, with the potential of "upgrading" aberrant ones to death -- even where the jury has differed from the judge on sentence, and recommended death. The same limited function of "consistency review" by Georgia appellate courts -- also designed to avoid disproportionate death sentences-- was approved in Gregg v. Georgia:

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

428 U.S. at 206.

A proportionality review of death sentences alone has been approved because the unique nature of capital punishment creates a corresponding need to avoid its erroneous imposition. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). There is no corresponding constitutional need for reliability about a sentence of life imprisonment, such as the one petitioner's jury recommended. The "reverse

proportionality" review applied by the lower courts to a jury recommendation of life literally stands the Constitution on its head.

3. The lower courts' "consistency" doctrine in this case necessarily affected, and abridged, petitioner's distinct Eighth Amendment right to have the sentencing authority give full consideration to his individual character and record. It increased "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978)(plurality opinion of the Chief Justice). The trial court treated petitioner not as an individual, but simply as part of a two-person crime for which two equalized sentences had to be imposed -- literally in one sentencing order.[11/]

The result was a "false consistency," one "produced by ignoring individual differences." Eddings v. Oklahoma, 102 S. Ct. 869, 875 (1982). It necessarily led to a lessened consideration of those aspects of petitioner's individual background and character that distinguished him from his co-defendant -- and which were relied on by the jury. App. at 21a. This is the precise risk condemned by this Court's statement in Lockett: "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605.

11/ The blending of the two defendants' situations by the sentencing judge even included citation of evidence elicited only at the trial of petitioner's co-defendant in arriving at the sentence for both. Compare App. at 16a with 20a-21a. This raises serious questions under Gardner v. Florida, 430 U.S. 349 (1977).

4. The approach below was not an aberration. On the contrary, it is the inevitable consequence of a course upon which the Supreme Court of Florida embarked when it decided Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). In Barclay, as in this case, death was imposed on a defendant whose jury had recommended life, and whose co-defendant had received a death sentence following a recommendation of death by his advisory jury. The Florida Supreme Court found that the same facts regarding participation in the crime applied equally to Barclay and his co-defendant. It then reasoned that the need for consistency in those circumstances justified an override of the jury recommendation of life:

> When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail. In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld. Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted.

Barclay, 343 So.2d at 1271.[12/]

In two other cases decided since Barclay, the Florida Supreme Court has suggested that Furman requires courts to apply a "consistency" factor in addition to factors specified in the state's sentencing statute. In Johnson v. State, 393 So.2d 1069 (Fla. 1980), and Douglas v. State, 373 So.2d 895 (Fla. 1979), the Florida court upheld the procedure for overriding jury recommendations on the

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12/ The error was arguably not prejudicial in Barclay because none of the statutory mitigating factors were established in that case and, moreover, the individual differences between the defendants there were "nominal." Id. The same cannot be said of the present case. Yet, the Florida court relied on Barclay to support its conclusion that petitioner's sentence should be equalized to that of his co-defendant. App. at 3a.

grounds that such a procedure is constitutionally "necessary", in light of Furman, to acheive consistent results.

As these Florida decisions demonstrate, the concept of "consistency" as an additional factor to be applied by sentencing authorities is becoming deeply imbedded in Florida law. Since more death sentences have been imposed in Florida than anywhere else in the nation,[13/] this doctrine will have widespread effect. This Court should grant the petition for certiorari to correct this serious misapplication of the Court's decisions.

13/ N.A.A.C.P Legal Defense and Educational Fund, Inc., Death Row U.S.A. (August 20, 1982).

III. THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT

During the penalty phase of petitioner's trial, the judge ruled that Dr. Sidney Merin, a clinical psychologist, "[was] not to discuss rehabilitative capacity" because the list of mitigating factors in Fla. Stat. Ann. § 921.141(6) (App. at 30a-31a) does not include a defendant's capacity for rehabilitation. (R. at 1545-46, 1567-68). At petitioner's sentencing proceeding and in the trial court's findings in support of sentence, the judge compounded his error by considering only those mitigating factors explicitly mentioned in section 921.141(6), App. at 12a-14a, 21a-22a. The Supreme Court of Florida in effect dismissed this mistake as harmless error, reasoning that "[t]he effectiveness of [Dr. Merin's] testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982).

It is true that the jury recommended life without Dr. Merin's testimony on rehabilitative capacity, but it was not a harmless error. The judge imposed death, and he did not hear, or consider, that evidence. Indeed, he excluded the evidence as a matter of law. (R. at 1545-46). By thereafter imposing and approving the death sentence, the Florida courts have emasculated this Court's injunction in Lockett v. Ohio, 438 U.S. 586 (1978):

> [T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant

> proffers as a basis for a sentence less than death.

Id. at 604 (plurality opinion of the Chief Justice) (emphasis in original) (footnotes omitted).

Because the Ohio statute in Lockett permitted the sentencer to consider only specifically enumerated mitigating factors, it was held unconstitutional[14/] whereas the Florida statute was upheld in Profitt. In recent decisions, however, this Court has extended Lockett to individual sentencing proceedings as well as capital sentencing statutes. Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (sentencer may not, as a matter of law, refuse to consider any relevant mitigating evidence); Green v. Georgia, 442 U.S. 95 (1979) (per curiam) (reliable, highly relevant hearsay testimony may not be excluded from a penalty hearing).[15/]

Evidence of rehabilitative capacity would clearly have been relevant to mitigation of sentence. It was one of the types of mitigating evidence the trial judge failed to consider in Eddings. 102 S.Ct. at 872. The State of Florida itself previously conceded the relevance of such evidence in Gardner v. Florida, 430 U.S. 349, 360 (1977). There, the Court noted that rehabilitation becomes irrelevant once a defendant is actually sentenced to death,

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14/ See also Bell v. Ohio, 438 U.S. 637 (1978). The principles enunciated in Lockett derived from a series of earlier decisions that invalidated mandatory death penalty laws while upholding statutes providing for consideration of all relevant mitigating factors. Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977) (per curiam); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

15/ In addition, the four Justices who dissented from the broad felony-murder rule announced in Enmund v. Florida, 102 S. Ct. 3368 (1982), nevertheless concluded that the trial judge's fundamental misunderstanding of the defendant's role in a capital felony was so likely to have infected the sentencing decision as to require a new sentencing hearing. Id. at 3392-94 (O'Connor, J., joined by Burger, C.J., Powell & Rehnquist, JJ., dissenting).

since "the extinction of all possibility of rehabilitation is one of the aspects of the death sentence that makes it different in kind from any other sentence." Id. Conversely, rehabilitation is a fortiori relevant in determining what sentence to impose.

It is, therefore, of no constitutional moment that the jury suggested life imprisonment despite the exclusion of Dr. Merin's assessment of petitioner's rehabilitative capacity. Under Florida law, "the sentencer" is the judge. Fla. Stat. Ann. § 921.141(2)-(3), App. at 28a-29a. By forbidding Dr. Merin's testimony about petitioner's rehabilitative capacity, the trial judge refused to consider, as a matter of law, "[an] aspect of a defendant's character or record . . . that the defendant proffer[ed] as a basis for a sentence less than death." Lockett, 438 U.S. at 604. The fact that Florida's sentencing procedure was found constitutionally sufficient in Proffitt v. Florida, cannot affect the conclusion: The Constitution required the sentencer to listen to such evidence. See Eddings, 102 S. Ct. at 875-76 & n.10; Lockett, 438 U.S. at 604-05.[16/] In ruling that the trial judge need not do so, the Florida Supreme Court sanctioned a disturbing curtailment of this Court's past holdings, and called into question the continued vitality of Lockett and Eddings in the Florida courts. In order to assure that this fundamental safeguard is followed in Florida and other states whose death penalty statutes otherwise pass constitutional muster, the petition for certiorari should be granted.

16/ The error in this case is more egregious than that in Eddings. Here the court completely excluded evidence of rehabilitative capacity, whereas in Eddings the judge actually heard the testimony at issue. Hence, it is unnecessary to speculate whether the trial court simply gave insufficient weight to a mitigating factor. Cf. Eddings, 102 S.Ct. at 881-82 (Burger, C.J., dissenting).

IV. RECENT DEVELOPMENTS RENDER FLORIDA'S JURY OVERRIDE OF LIFE SENTENCES UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED

Petitioner was sentenced to die under a Florida procedure allowing trial courts to impose a death sentence despite a jury recommendation of life imprisonment. Fla. Stat. Ann. § 921.141(2)-(3), App. at 28a-29a. In Dobbert v. Florida, 432 U.S. 282 (1977), this Court indirectly expressed general approval of that procedure. In view of recent factual and doctrinal developments, however, the override procedure cannot survive constitutional scrutiny. Because Florida's override procedure affects the lives of numerous defendants in capital cases, this Court should now examine the procedure "against evolving standards of procedural fairness." Gardner v. Florida, 430 U.S. 349, 357 (1977).

1. State legislative enactments reflect a general consensus against judicial overrides of jury determinations of life. Only three states currently allow death sentences to be imposed after a jury has recommended a sentence of life imprisonment. Fla. Stat. Ann. § 921.141, App. at 28a-31a; Ind. Stat. Ann. § 35-50-2-9e; Ala. Acts 1981, No. 81-178, §§ 8-9. At no time in the past thirty years have more than three states allowed judges to override such jury recommendations. Cf. Andres v. United States, 333 U.S. 740, 767 (1948). There is also an emerging consensus that, where there is more than one participant in the sentencing process, the sentencers must agree unanimously in order to impose a death sentence. Of the twenty-nine states in which juries must determine that death is appropriate in order for

capital punishment to be imposed,[17] all but two clearly require that the jury determination of death be unanimous.[18]

These objective indicia of contemporary societal standards place the constitutionality of Florida's override procedure in substantial doubt. Indeed, the Court has repeatedly found that the Eighth Amendment is not satisfied when a capital sentencing procedure has been rejected by an overwhelming majority of the states. See Woodson v. North Carolina, 428 U.S. 280, 288-301 (1976); Coker v. Georgia, 433 U.S. 584, 592-97 (1977); Enmund v. Florida, 102 S. Ct. 3368, 3372-76 (1982).

At the same time, recent empirical evidence concerning the manner in which the override procedure is administered in Florida undermines the premise of this Court's holding in Dobbert v. Florida, 432 U.S. 282 (1977). In Dobbert, this Court rejected the ex post facto challenge of a petitioner who had received a death sentence despite a jury recommendation of life, and whose crime had been committed when Florida's death penalty statute made jury sentences final. Noting that a law violates the ex

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17/ Those states are Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. See App. at 40-41a. In Ohio and Kentucky death may only be imposed if the jury unanimously recommends it, but the trial court may reduce the jury death recommendation. Ohio Rev. Code Ann. § 2929.03(D) Ky. Rev. Stats. § 532.025.

18/ One of the exceptions, Nevada, requires that a panel of judges impose sentence if the jury cannot agree, and the panel must be unanimous to impose death. Nev. Rev. Stat. § 175.554. The requirements of the other state, Connecticut, are unclear. Conn. Gen. Stat. Ann § 53a-46a (1982).

post facto clause only when it works a more onerous burden overall than did the previous law, the Court found that the Florida override procedure was overall more favorable to defendants than the previous law. Id. at 295. In reaching this conclusion, the Court reasoned that, on the one hand, jury recommendations of death under the current statute are not final, as they had been under prior law; on the other hand, jury recommendations of life can be overridden, under the present law, only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. at 295 (quoting Tedder v. State, 322 So.2d 908, 910 (1975)).

Recent empirical evidence shows that the standard in Tedder v. State has not been utilized by the Florida courts in the manner that this Court envisioned. A recent study tabulated the results in all 79 cases between 1972 and 1978, in 21 Florida counties, in which either the judge or the jury chose death. The study found that in six percent of the cases, the judges granted a life sentence despite a jury recommendation of death. But in 28 percent of the cases, the judge imposed death notwithstanding a jury recommendation of life. Thus, Florida judges overrode a jury recommendation of life imprisonment almost five times as often as they overrode a jury recommendation of death. Gillers, Deciding Who Dies, 129 U. Pa. L. Rev. 1, 67-68 n.318 (1980) (summarizing data reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished study)). These and other statistics[19/] sharply refute the assumption underlying both

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19/ Of 181 persons on death row in Florida as of August 20, 1982, 33 were under death sentences imposed despite a jury

(Continued)

the actual holding in Dobbert, and this Court's implied approbation of the override procedure in that case.

2. In this case, the Florida Supreme Court said that the standard in Tedder v. State had been met -- that "virtually no reasonable person could differ on the appropriateness of the death penalty." App. at 3a. Yet, several ostensibly reasonable people did in fact differ with the Florida Supreme Court majority -- the two dissenting justices on that court and anywhere from seven to twelve jurors. (Under the Florida procedure, the jury must only indicate that a majority of its members had supported the recommended sentence, without indicating the precise number of jurors in the majority.) This case vividly illustrates the statement in Spinkellink v. Wainwright, 578 F.2d 582, 605 (5th Cir. 1978):

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case.

The Florida standard in Tedder v. State has proved inherently unadministrable. By its very nature, it assumes at least a difference of opinion between a properly instructed jury (representing a cross-section of the community) and reviewing judges (who may represent only one element of society) -- and a regular practice of overriding jury determinations of life has occurred. It has cast on the defendant, rather than the state, the risk of any

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(footnote 19 continued)

recommendation of life imprisonment. Of those 33, the sentences of 11 had been affirmed by the Supreme Court of Florida. The appeals of the remaining 22 were still pending. An additional 38 persons sentenced to die since 1972 following a jury recommendation of life imprisonment are, for a variety of reasons, no longer under a sentence of death. Unpublished study conducted by NAACP Legal Defense and Educational Fund, Inc. (October 1982).

difference between jurors and judges. Cf. Bullington v. Missouri, 451 U.S. 430, 446 (1981).

3. Petitioner's recommended life sentence issued from a jury that applied objective sentencing criteria determined by the state legislature. Two forces were thus combined -- jury determinations and legislative enactments -- which the Court has previously found to be the primary indices of community values that guide imposition of the death penalty.

With respect to juries, the Court in Witherspoon v. Illinois, 391 U.S. 510 (1968), declared that the capital sentencing jury's task is to "express the conscience of the community on the ultimate question of life or death." Id. at 519. This jury function is deemed essential to ensure that individual sentence determinations "reflect 'the evolving standards of decency that mark the progress of a maturing society.'" Id. at n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). This Court has, moreover, relied on jury sentencing patterns in holding that imposition of the death penalty in certain circumstances is unconstitutional because it would offend contemporary values. See, e.g., Coker v. Georgia, 433 U.S. 584, 596-76 (1977); Enmund v. Florida, 102 S. Ct. 3368, 3375-76 (1982). Enactments of state legislatures have been similarly viewed. Woodson v. North Carolina, 428 U.S. at 294-95 ("legislative measures adopted by the people's chosen representatives weigh heavily in ascertaining contemporary standards of decency.").

Where, as here, the jury's recommendation of life is supported by the presence of statutory mitigating circumstances, a defendant's right to be sentenced in accordance with that recommendation is particularly compelling.

Petitioner presented evidence at the sentencing hearing in support of several different statutory mitigating circumstances.[20] The jury's recommendation could have rested on any one or more of these factors. But it was uncontroverted that petitioner established at least one of the statutory mitigating circumstances (no prior arrests or convictions) -- and the sentencing judge so found.

By enacting into law certain mitigating circumstances, the legislature has represented a community consensus that the presence of any one of those circumstances may justify leniency. When a jury finds a statutory mitigating circumstance to exist, the views of the two critical repositories of community values identified by this Court -- the jury and the legislature -- have coincided in the judgment that leniency is justified. For this reason, a jury's power to render a life sentence is at its apex when it finds a statutory mitigating circumstance to exist -- as it did in this case.

Conversely, the reliability of a death sentence is most subject to question when there is disagreement among the principal participants in the sentencing process, the jury and the sentencing judge. When such a disagreement exists -- and where the only participants representing a cross-section of the community believe that the individual

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20/ Petitioner presented evidence that he was 23 years old (R. at 1573); that he had no prior criminal record (R. at 1573); that he had used drugs on the night of the crime. (R. at 1599, 1318); and that he is highly susceptible to the influence and domination of others (R. at 1590-91). This evidence was relevant to the statutory mitigating circumstances contained in Fla. Stat. Ann. § 921.141(6)(g) (age of defendant at time of crime); (a) (defendant had no significant criminal history); (b)(defendant committed crime under influence of extreme mental or emotional disturbance); and (e) defendant acted under extreme duress or under substantial domination of another person). App. at 30a-31a.

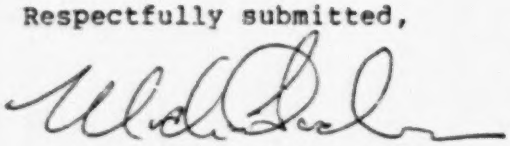
should be sentenced to life -- there is a substantial risk that the death penalty is not appropriate. Cf. Lockett, 438 U.S. at 605. A death sentence imposed in these circumstances fails to satisfy the Eighth Amendment "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305.

Florida has had an increasing number of death sentences and jury overrides, despite the rejection of the practice in most other states and the inherent reliability of a properly instructed jury applying the standards of the state legislature. In view of the inherent unreliability, and increasing use, of the the Florida override procedure to "upgrade" jury determinations of life to death, the petition for certiorari should be granted.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida.

Respectfully submitted,



Michael Sandler
(Counsel of Record)

Charles G. Cole
Rebecca L. Hudsmith
Diane F. Orentlicher

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

Ernest Lee MILLER, Appellant,

v.

STATE of Florida, Appellee.

No. 58795.

Supreme Court of Florida.

March 25, 1982.

Rehearing Denied July 22, 1982.

Defendant was convicted before the Circuit Court, Pasco County, Wayne L. Cobb, J., of first-degree murder and was sentenced to death notwithstanding jury recommendation of life imprisonment, and defendant appealed. The Supreme Court held that: (1) although cellmate of defendant had acted as informant and had spoken with lead investigator of instant homicide before defendant made incriminating statement to codefendant, there was no error in admitting the statement, and (2) there was no error in imposing death penalty as disparity in recommended sentences, with jury which convicted codefendant of similar offense recommending death, was not warranted.

Affirmed.

McDonald, J., concurred with conviction and dissented with sentence with an opinion in which Overton, J., concurred.

1. Criminal Law ⇐412.1(2)

As overheard by cellmate, defendant's inculpatory statement to codefendant while awaiting trial was not required to be suppressed where although cellmate acted as informant in several drug cases and had spoken with lead investigator of instant homicide before defendant made the statement the cellmate and the detective testified that he was not to draw defendant or codefendant into talking about the homicide charges and there was no showing that he occupied a position of trust regarding defendant or that he deliberately used his position to secure incriminating information.

2. Criminal Law ⇐1170(5)

There was no reversible error in failing to allow defendant's psychologist to testify to his rehabilitative capacity as effectiveness of psychologist's testimony, even without the complained-of omission, was evidenced by jury's recommendation of life imprisonment.

3. Criminal Law ⇐983

Although jury, which found defendant guilty of first-degree murder recommended life imprisonment while another jury which found codefendant guilty of the same offense recommended death sentence, it was not error to impose death penalty on both defendants as on totality of circumstances virtually no reasonable person could differ on the appropriateness of the death penalty and disparity in recommended sentences was not warranted.

Larry S. Hersch of Waller & Hersch, Dade City, for appellant.

Jim Smith, Atty. Gen., and Michael J. Kotler, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Ernest Miller appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and affirm both the conviction and sentence.

A grand jury indicted Miller and his stepbrother William Jent for the death of a young woman known only as "Tammy." The trial court severed their cases for trial, but all their pre- and post-trial proceedings were combined. Their respective juries convicted each defendant of first-degree murder as charged, but Miller's jury recommended life imprisonment while Jent's recommended a sentence of death. In a combined sentencing order the trial court im-

1. Art. V, § 3(b)(1), Fla.Const.

posed the death penalty on both Miller and Jent.[2]

Miller urges nine points on appeal; six of these points[3] are identical to points raised in *Jent v. State*, 408 So.2d 1024 (Fla.1981), and have been decided adversely to Miller's contentions in *Jent*. Even though Miller and Jent had separate trials, *Jent* disposes of Miller's arguments regarding the evidence presented at his trial. With the exception of two witnesses who testified at only one trial each, the same persons testified substantially the same at both trials. On reviewing the instant record, we find Miller's conviction supported by competent substantial evidence.

Miller urges that the trial court erred in failing to suppress a statement which Miller made to Jent while in jail awaiting trial. While listening to a radio newscast about a man who had confessed to several murders, Miller asked Jent if he thought that person had "confessed to the one we did." A cellmate, lying on his bunk reading a book, overheard Miller's question and, after a suppression hearing, testified to this episode at trial.

[1] The cellmate had acted as an informant for the sheriff's department in several drug cases and had spoken with the lead investigator of the instant homicide sometime before Miller made his incriminating statement. This, claims Miller, made the cellmate an agent of the state, requiring reversal of his conviction under *United States v. Henry*, 447 U.S. 264, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980), and *Malone v. State*, 390 So.2d 328 (Fla.1980). We disagree.

Both the cellmate and the detectives who interviewed him testified that he was instructed not to draw Miller or Jent into talking about the charges against them. There is no evidence in the record to show that the cellmate occupied a position of trust regarding Miller. Likewise, there is no evidence that the cellmate "deliberately used his position to secure" incriminating information." 447 U.S. at 270, 100 S.Ct. at 2186. Unlike in *Malone*, Miller's comment was not "directly elicited by the State's stratagem deliberately designed to elicit an incriminating statement." 390 So.2d at 329. We find that the trial court did not err in denying the motion to suppress and properly allowed the cellmate's testimony into evidence.

[2] Miller's final arguments are that the trial court improperly limited the consideration of mitigating evidence and that the court erred in overriding the jury's recommendation of life imprisonment. The trial court gave the standard instruction on aggravating and mitigating circumstances, which this Court recently upheld against the same claim of unconstitutionality as made in this appeal. *Peek v. State*, 395 So.2d 492 (Fla.1980), *cert. denied*, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981). We therefore find no merit to Miller's claim of impropriety regarding the sentencing instructions. Additionally, we do not find reversible error in the trial court's failing to allow Miller's psychologist to testify as to Miller's rehabilitative capacity. The effectiveness of the psychologist's testimony, even without the complained-of omission, is evidenced by the jury's recommendation of life imprisonment.

[3] In his sentencing order the trial court found no substantive difference between Miller and Jent in their participation in the crime. Notwithstanding the jury's recommendation, he found that Miller clearly deserved the death penalty. Mindful of the constitutional demand that the death penalty must be imposed in a regular, rational, consistent manner, the court also found that following the recommendation of Miller's jury would result in an unwarranted disparity in sentences. He therefore sentenced both defendants to death, finding

2. The facts are set out more fully in *Jent v. State*, 408 So.2d 1024 (Fla.1981).

3. (1) Denial of access to grand jury testimony; (2) sufficiency of the evidence; (3) failure to grant new trial; (4) "weakness" of the evidence in mitigation; (5) constitutionality of § 921.141(5)(i); (6) victim's identity.

that the mitigating evidence did not outweigh the evidence proved in aggravation.

The standard set out in *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), has been met in this case. On the totality of the circumstances virtually no reasonable person could differ on the appropriateness of the death penalty. *See Johnson v. State*, 393 So.2d 1069 (Fla.1980). We agree that the disparity in the recommended sentences is not warranted. *See Barclay v. State*, 343 So.2d 1266 (Fla.1977), *cert. denied*, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d 237 (1978).

Finding no error, we affirm both the conviction and sentence.

It is so ordered.

SUNDBERG, C. J., and ADKINS, BOYD and ALDERMAN, JJ., concur.

McDONALD, J., concurs with conviction and dissents with sentence with an opinion, in which OVERTON, J., concurs.

McDONALD, Justice, dissenting.

I concur in affirming Miller's conviction but dissent as to his sentence.

The horrible death imposed upon the decedent was the culmination of a drug and alcohol infested party in which the defendants Miller and Jent participated with other young men and women. This group had left a bar and arrived at a swimming hole near a railroad trestle where the victim, not with or a part of the party, was encountered. A fight ensued between her and one of the girl friends, whereupon Miller and Jent interceded on behalf of the girl friend. These two thereafter beat the victim into helpless submission (Miller used a stick handed to him by one of the girls) following which they threw her into the trunk of Miller's car. Later she was raped by Miller, Jent and two more men while the girls looked on. They doused her with gasoline and set her afire. One can hardly imagine a more brutal, senseless, gruesome or deplorable crime. It cannot be condoned in the slightest. But it does not necessarily follow that the penalty should be death, particularly when the jury has recommended life.

In *Tedder v. State*, 322 So.2d 908 (Fla. 1975), this Court set out the standard which must be met in order to affirm a trial court's sentence of death over a jury's recommendation of life imprisonment.

When all the circumstances surrounding this homicide, in conjunction with the character and nature of the defendant are considered, it cannot be said that the facts are so clear and convincing that virtually no reasonable person could differ that death is appropriate. Therefore I feel the jury's recommendation should be followed.

A psychologist testified that Miller has a weak ego, that he is a "follower," that he is whatever his environment may be around him. He indicated that the violence that comes from Miller is what Miller believes others may want of him and that Miller would be quite willing to go along with them. The psychologist indicated that if the group were different so would be Miller's conduct. By its recommendation, the jury obviously considered this testimony and found Miller deserving of some mitigation of sentence. The defense presented no such evidence at Jent's sentencing proceeding, and I find that the evidence presented in the two sentencing proceedings justified the respective jury recommendations.

It appears to me that the trial judge felt that the circumstances of this homicide were so egregious that they overwhelmed any other consideration. Still, there was but one real aggravating circumstance (cruel, atrocious and heinous) and one admitted mitigating factor (no prior criminal record). The evidence is also susceptible of a finding that this defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

I would vacate Miller's sentence and remand for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years.

OVERTON, J., concurs.

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JULY 22, 1982

ERNEST LEE MILLER,	**	
Appellant,	**	CASE NO. 58,795
vs.	**	Circuit Court Case No. 79-8 (Pasco)
STATE OF FLORIDA,	**	
Appellee.	**	

On consideration of the motion for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Deputy Clerk

cc: Hon. Joseph E. Pittman, Clerk
Hon. Wayne L. Cobb, Judge

Lester Bales, Jr., Esquire
Michael J. Kotler, Esquire

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PASCO COUNTY FLORIDA

CASE NUMBER CF79-847

STATE OF FLORIDA

VS.

ERNEST L. MILLER

JUDGMENT AND SENTENCE

You, ERNEST L. MILLER, being now before the Court, attended by your attorney, LARRY HERSCH, and you having (1) been tried and found guilty of [redacted] to MURDER IN THE FIRST DEGREE

the Court Adjudges that you are guilty of said offense, and it is the Sentence of the Law and the judgment of the Court that you, ERNEST L. MILLER, be committed to the custody of the (1) [redacted] CORRECTIONS to be imprisoned for the term of sentenced to Death. To be securely confined until such time as sentence is executed

and you are further Ordered to pay a fine and cost in the amount of $

DONE and ADJUDGED in open Court at DADE CITY Pasco County, Florida, this the 30th day of JANUARY, 19 80, pursuant to Rules 3.670 and 3.700 FCRP.

JUDGE

(Fingerprints, if required by Section 30.31 Florida Statutes)

4 FINGERS TAKEN SIMULTANEOUSLY	LEFT THUMB	RIGHT THUMB	4 FINGERS TAKEN SIMULTANEOUSLY

I hereby certify that the above and foregoing fingerprints on this judgment are the Fingerprints of the defendant, ERNEST L. MILLER, and that they were placed thereon by said defendant in my presence in open Court, this the 30th day of JANUARY, 19 80, pursuant to Section 30.31.

JUDGE

BOOK LL PAGE 0663

CLERK

RECORD VERIFIED

342

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IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PASCO COUNTY, FLORIDA

STATE OF FLORIDA *
*
vs. * Case No. 7900848CFAES
*
ERNEST MILLER *
*

ORDER

THIS CAUSE having come on to be heard upon the Defendant's Motion for Grand Jury Testimony and the Court being fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that said Motion is hereby denied in that the Court felt there was no proper predicate laid to have it either transcribed or reviewed by counsel.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, on this 1 day of Nov., 1979.

WAYNE L. COBB, Circuit Judge

Copies to:
Larry S. Hersch, Esquire
State Attorney's Office
Public Defender's Office

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

STATE OF FLORIDA,	
Plaintiff,	
-vs-	CASE NUMBER 7900848CFAES
ERNEST LEE MILLER,	
Defendant.	

FILED
1 02 PM '80

PROCEEDINGS:	SENTENCING
BEFORE:	Honorable Wayne L. Cobb Circuit Judge Sixth Judicial Circuit
DATE:	January 30, 1980
PLACE:	Pasco County Courthouse Dade City, Florida
APPEARANCES:	Charles Cope, Esquire and Robert P. Cole, Esquire Assistant State Attorneys Attorneys for Plaintiff
	Larry S. Hersch, Esquire Attorney for Defendant

OFFICIAL COURT REPORTERS
303 PASCO COUNTY COURTHOUSE
DADE CITY, FL 33525
PH. (904) 567-3271

FRANK NEWMAN, OFFICIAL
LINDA J. GLIDEWELL, DEPUTY
PEGGY ANN CROFT, DEPUTY
JOHN P. DILLON, DEPUTY

particular case, you have seen the case, you have sat here. The case is one where a heinous and cruel murder was committed upon this girl, even evidence to indicate that she was still alive when she was burned.

Judge, the State's position is that the aggravating circumstances far outweigh the mitigating circumstances. If any case ever cried out for the death penalty, this one does.

The State would request that this Court impose the ultimate penalty in this case.

Thank you, Judge.

THE COURT: Thank you, Mr. Cole.

Mr. Jent and Mr. Miller, we need to fingerprint you, and Mr. Jackson would you fingerprint Mr. Miller and Mr. Jent, please?

THE BAILIFF: Yes, sir, Your Honor.

THE COURT: Mr. Miller and Mr. Jent, will you approach the bench, please, with your counsel.

Ernest Lee Miller and William Riley Jent, pursuant to the jury verdicts returned in your respective trials, this Court now adjudicates you each guilty of murder in the first degree of the girl known only to this Court as Tammy. It is now the duty of this Court to sentence each of you for that crime.

Under Florida law, only two sentences are available

to this Court; life imprisonment with a mandatory minimum of 25 years, or death, but this Court may not impose upon either of you any sentence other than those two, one of those two.

A few years ago, the U.S. Supreme Court determined that if the death penalty were to be imposed by the states that the U.S. Constitution demanded that it be imposed only with regularity and only under predetermined and objective standards and circumstances. The decision of whether or not to impose a sentence of death must not be left to the discretion of either juries or judges. The people of the State of Florida through their Legislatures have determined that the social value of individual human life demands the imposition of death penalty in certain cases. Those cases are first degree murder and sexual battery of children when certain established aggravating circumstances were found to outweigh certain established mitigating circumstances.

A jury in both of your cases have already weighed the circumstances. A jury for Mr. Miller recommended life imprisonment. A jury for Mr. Jent recommended death. This Court has carefully weighed those circumstances also, and I think it is incumbent upon this Court to tell you which circumstances it finds to be aggravating and which circumstances it finds to be

mitigating.

The first circumstance that the Court must consider is that the crime, aggravating circumstances, is that the crime for which the defendant is to be sentenced was committed while the defendant was under a sentence of imprisonment, that is not applicable in either of your cases.

Second is that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence to some person. That also was not applicable in either of your cases.

Third is that the defendant in committing the crime for which he is to be sentenced knowingly created great risk of death of many persons. Again, that is not applicable in either of your cases, in the Court's opinion.

Fourth is that the crime for which the defendant is to be sentenced was committed while the defendant was engaged or was an accomplice or commission of or attempt to commit or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping or aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb. I realize that there was some argument about that, but this Court

does not consider that to be applicable either.

The fifth is that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or affect an escape from custody. I suppose that it could be argued that it was that, the last part of the murder was to prevent some detection, but this Court does not consider that fifth aggravating circumstance to be applicable after careful consideration.

Six is that the crime for which the defendant is to be sentenced was committed for pecuniary gain and there is no indication of that. That is not applicable.

Seventh is that the crime for which the defendant is to be sentenced was committed to disrupt or to hinder lawful exercise of a governmental function or enforcement of law. That is not applicable, no evidence of that.

Next is that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with other indifference or for the enjoyment of suffering of others or pitiless. This Court certainly considers that aggravating circumstance to be applicable to this case.

Next is that the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification. This Court also considers that aggravating circumstance to be applicable. However, there seems to be some overlapping -- some overlap in this Court's mind even though in those last two, so this Court is only going to consider those last two as one aggravating circumstance.

Mitigating circumstances must also be considered by the Court and they are first, that the defendant has no significant history of prior criminal activity. That mitigating circumstance appears to be applicable. There is no evidence that either of you have any significant history of prior activity.

Second is that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance. I don't know whether the jury considered that or not. Mr. Hersch has asked that that be considered applicable for Mr. Miller. This Court does not find any evidence in the trial or in any of the other proceedings that would indicate that Mr. Miller or Mr. Jent was under the influence of any extreme mental or emotional disturbance.

The next is that the victim was participant in the defendant's conduct or consented to the act. That certainly is not applicable.

Fourth is that the defendant was an accomplice in the offense for which he is to be sentenced that the offense was committed by another person and the defendant's participation was relatively minor. This Court can't honestly say that either of you were accomplices. The evidence is clear that both of you equally participated in this crime. The Court does not consider that to be applicable.

Fifth is that the defendant acted under extreme duress or under substantial domination of another person. There was some indication that the -- at the sentencing phase of Mr. Miller's trial by a psychologist that that might be applicable, that Mr. Miller was easily led and the inference at least is suggested that he was led by Mr. Jent. I don't know what weight the advisory jury gave to that in recommending a life sentence, but this Court does not consider that that is applicable in this case. There is no evidence that Mr. Miller had any diminished function at all. As a matter of fact, Dr. Merin testified that Mr. Miller's functional IQ was in the average range and theoretical IQ was above the average range.

The sixth is that the capacity of the defendant to appreciate the criminality of the conduct or to conform his conduct under requirement of the law was substantially impaired. There is no indication that either of you did not appreciate or were not able to appreciate the criminality of your conduct nor that you were not able to conform your conduct in this case to the requirements of the law. This Court does not consider that that is applicable for either of you.

The last mitigating circumstance that the Court must consider is the age of the defendant at the time of the crime. Mr. Miller is 23 years old and Mr. Jent is 28. You both are certainly of an age when that should not be considered as any mitigating circumstance. Our Supreme Court has said that it must be emphasized that the procedure to be followed by trial judges and juries in weighing these aggravating and mitigating circumstances is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but it is rather to be a reason judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

The goal in the law is regularity or uniformity in

the application of those available sentences. Now, the Court, our Supreme Court in Florida has also said that a jury recommendation under our trifurcated death penalty statute should be given great weight in order to sustain a sentence of death following a jury recommendation of life, the fact suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ. That Court has also said that two coperpetrators who participated equally in the crime would have dispaired sentences if the jury recommendation were to be accepted has to be a strong consideration. The Court said it would have a hollow ring in the halls of justice if the sentences in those kind of cases were not equalized. This Court sat through the trials of both Mr. Miller and Mr. Jent. The evidence in both of those cases indicated that this was a particularly heinous and a particularly deliberate crime to this Court evidence is that this girl was beaten at one site on the Withlacoochee River then transported to Mr. Miller's home where the girl although unconscious and I don't know whether she was feeling pain or not or feeling embarrassment or what but then she was subjected to the indignity of having her clothes taken off and being raped by four people while other people

were forced to watch while laying on the hood of a car or the trunk of a car. She was then carried some several miles into the Richloam Game Reserve where she was then thrown on the ground and gasoline was poured over her and there was an indication that Mr. Jent at Mr. Jent's trial that she then raised her arm in an attempt to get up and that it was, that gasoline was -- she was knocked back down and then the gasoline was ignited. This Court has examined most if not all of the death penalty cases reviewed by the Florida Supreme Court since 1972. It would be hard to imagine this Court finding perhaps only one in which the murder was any more heinous, any more deliberate than it was in this case. The Court therefore must find that the aggravating circumstances or circumstances in both of these cases outweigh the mitigating circumstances and it is therefore the sentence of this Court that both Mr. Miller and Mr. Jent be put to death according to the law of Florida.

Gentlemen, you have the right to an automatic appeal to the Supreme Court of the State of Florida as a result of this sentence and adjudication. I am hereby directing the respective attorneys to pursue that appeal or to prosecute that appeal with dispatch and vigor directing the Clerk to prepare the certify -- and certify

the record of this trial to the Supreme Court with 60 days and directing the Court Reporter to prepare the record of these proceedings including the proceedings last night on motions for a new trial. Mr. Holton, do you have any questions?

MR. HOLTON: I have no questions about the sentence, Your Honor, I would request that Mr. Jent be allowed some visitation with his family prior to his being transported to the system. Visitation this date has been essentially through a six by six inch glass window at the jail. Since I think it's a fairly safe bet that Mr. Jent will be a little hard to reach in the near future, it would I think be a courtesy that would be appreciated by myself and by Mr. Jent if the Court would direct the sheriff to make arrangements for such visitation under whatever security precautions the sheriff feels necessary.

THE COURT: Mr. Holton, I would advise that I wi-l investigate that and what I would like to do and I would like to do that if it's reasonably possible. If it is; if it is, I will direct the sheriff to do that. I am not doing it without some investigation as to serious problems and I'm not aware of those at this time.

MR. HOLTON: Yes, sir.

THE COURT: I'll do that right away.

MR. HOLTON: Thank you.

THE COURT: Mr. Hersch?

MR. HERSCH: I would also make the same request. Mr. Miller hasn't had close contact with his family except during the trial proceedings when they saw him passing back and forth. I would.

THE COURT: I will investigate that for both of you and try to get some decision on that in the next few minutes. Anything else?

MR. COLE: No, sir.

THE COURT: Madam Clerk?

THE CLERK: No, sir.

THE COURT: This Court will stand adjourned.

(Proceedings concluded.)

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

CF79-847

Opn 3127

STATE OF FLORIDA :
:
vs :
:
WILLIAM RILEY JENT; :
EARNEST LEE MILLER :

FINDINGS IN SUPPORT OF SENTENCES

On November 15, 1979, Earnest Lee Miller was convicted by a jury of the first degree murder of a girl known only as Tammy. That same jury recommended a life imprisonment sentence for Mr. Miller. On December 20, 1979, a different jury also convicted William Riley Jent of first degree murder in the same incident. That same jury recommended a death sentence for Mr. Jent.

It is now this Court's duty to sentence both Earnest Lee Miller and William Riley Jent for the first degree murder of a girl known only as Tammy.

In preparing to exercise that duty, this court carefully reviewed the Florida law relating to sentencing in capital cases (§921.141, Florida Statutes, and cases listed in appendix) and also carefully reviewed the application of the principles of the United States Constitution to sentencing in capital cases. Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972); Proffitt v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

This court presided over the trials of both defendants. A pre-sentence investigation was not considered by this Court to offer any assistance in this case and was not requested. It is not required. Thompson v. State, 328 So.2d 1, 4 (Fla. 1976).

Florida law only allows two choices in imposing sentences for capital felonies: life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. §775.082, Florida Statutes.

The Florida Legislature has also established guidelines to control and direct the exercise of the sentencing court's discretion

in selecting and imposing the proper sentence in capital cases. §921.141, Florida Statutes. Under these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances.

From all of the evidence available, this Court finds the following aggravating circumstances to exist in this case:

1. §921.141(5)(h), Florida Statutes. This murder was especially heinous, atrocious and cruel. These two defendants, in concert, beat this girl to unconsciousness, loaded her into an automobile, drove her to an isolated home of the defendant Miller, took her out of the automobile still unconscious, stripped her of her clothing, threw her onto the trunk (or hood) of an auto, subjected her to rape by four men while requiring several other girls to watch, dumped her unceremoniously back into the trunk of an auto, drove her to a secluded spot in the Withlacoochee State Forest, drug her out of the auto trunk, carried her into the bushes, poured gasoline on her, beat her back down when she tried to get up, then immolated her and left her to the processes of final degradation--acts epitomical of "wicked," "shockingly evil," and "vile." Furthermore, these acts demonstrated the defendants to not only be pitiless, but the public, gang rape of this victim during the perpetration of this murder demonstrated these defendants' enjoyment of the suffering of the nameless victim. Even the imagination of Hollywood at its most macabre is paled by the cruelty, the heinousness and the atrocity of this murder.

2. §921.141(5)(i), Florida Statutes. This crime was certainly committed by these two defendants in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Counsel for the defendants argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried

to sit up after the gasoline was poured on her, but before she was ignited. This Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

The conduct of the defendants was so callous in this case, however, that these two aggravating circumstances seem to blend into one.

None of the other aggravating circumstances are found to apply.

Having found aggravating circumstances to apply, the Court must consider any mitigating circumstances. Upon application of the available evidence in this case to the statutory mitigating circumstances, the Court finds as follows:

1. §921.141(6)(a), Florida Statutes. The defendants have no significant history of prior criminal activity. This mitigating circumstance applies to both defendants.

2. §921.141(6)(b), Florida Statutes. There was no evidence that this crime was committed while either defendant was under the influence of any mental or emotional disturbance. This mitigating circumstance does not apply to either defendant.

3. §921.141(6)(c), Florida Statutes. There was no evidence that the victim in this case was a willing participant in the defendants' conduct or consented to the acts culminating in her death. This mitigating circumstance does not apply to either defendant.

4. §921.141(6)(d), Florida Statutes. The defendants were accomplices in this crime but the participation of each defendant was equally aggressive and malevolant. Furthermore, no evidence indicated that either defendant acted under any duress or any domination of another person. At the sentencing phase of the trial of defendant Miller, Dr. Sidney Merin, a psychologist, did testify that Miller was a social follower. The jury may have been emotionally impressed with this personality appraisal. The jury recommended life imprisonment for Miller. But that appraisal does not square with he facts in

this case. The eyewitness' testimony indicated that each of these defendants tried to out-atrocity the other in killing this girl. This Court finds that neither of these mitigating circumstances applies to either of these defendants.

5. §921.141(6)(f), Florida Statutes. Dr. Merin testified that the defendant Miller had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. The evidence supports this appraisal for both Miller and Jent. They both knew the criminality of their conduct and were able to conform their conduct to the requirements of the law. The evidence indicates they enjoyed their heinous abandon. This mitigating circumstance does not apply to either defendant.

6. §921.141(6)(g), Florida Statutes. Jent was 28 years old and Miller 23 years old at the time of this crime. Both were of sufficient age that this mitigating circumstance does not apply to either.

After weighing the aggravating and mitigating circumstances existing in this case and comparing them to the circumstances found to be existing in most (if not all) of the death sentences reviewed by the Florida Supreme Court since 1972 (see appendix), this Court believes the aggravating circumstances of this case do outweigh the mitigating circumstances and a death sentence to be demanded for both defendants.

The jury that tried defendant Miller recommended life imprisonment for him. The Jent jury recommended death. In view of the Miller recommendation, this Court is required to give "greater weight" to the mitigating circumstances for him. Beckren v. State, 355 So.2d 111 (Fla. 1978). That jury weighed and considered the same aggravating and mitigating circumstances that have been weighed by this Court. Although this Court is not bound by the advisory sentencing verdicts, they do represent a direct expression of the social conscience of an informed

and responsible microcosm of our society. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908 (Fla. 1975). See also Lamadlin v. State, 305 So.2d 17 (Fla. 1974); McCaskill v. State, 344 So.2d 1726 (Fla. 1977). "It stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprisonment." Thompson v. State, 328 So.2d 1, 5 (Fla. 1976).

The evidence indicated no substantive difference whatsoever in the participation of these two defendants in this crime. The only evidence available to either the court or these two juries that might be considered to distinguish these two defendants is: (1) Jent was 28 years old while Miller was 23 years old, and (2) Dr. Merin testified that Miller was a social follower, while no psychologist testified for Jent.

This Court has carefully considered these two possible distinctions but does not see any rational basis supported by even a shred of evidence to consider either of these factors as a mitigating circumstance. These defendants participated equally in this crime.

Furthermore, of all the factual situations reviewed by the Florida Supreme Court since 1972, in death cases, this Court found only one approaching the cruelty, atrocity, or heinousness demonstrated in the case sub judice. (See Gardner v. State, 313 So.2d 675 (Fla. 1975))

> "It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting

> process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present." State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency. Proffit v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960, reh. den. 429 US 875, 50 L Ed 2d 158, 97 S Ct 197, 97 S Ct 198 (1976); Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972).

The jury for the defendant Jent has recommended death and this court finds that the weight of the aggravating and mitigating circumstances demand death sentences for both defendants. Therefore, if the recommendation of the jury for the defendant Miller were followed, that would result in two co-perpetrators who participated equally in a crime having disparate sentences. It would cause a hollow ring in the Florida halls of justice if the sentences in these cases were not to be equalized. (See Barclay v. State, 343 So.2d 1266 (Fla. 1977)).

It becomes obvious from even a cursory review of the facts supporting sentences of death reviewed by the Florida Supreme Court during the last eight years, that reasonable jurors have recommended death sentences be imposed in cases much less heinous, atrocious, cruel or deliberate than is found in this case.

Therefore after carefully weighing the aggravating and mitigating circumstances of this case, and considering the two disparate advisory sentencing verdicts, and after comparing the circumstances of this case with the circumstances existing in the death sentence cases reviewed by the Florida Supreme Court since 1972 which are listed in the appendix, and after carefully considering

the Constitutional standards espoused in Furman v. Georgia, supra, and Proffit v. Florida, supra, it is the judgment of this Court that both William Riley Jent and Earnest Lee Miller be put to death in the manner provided by Florida law for the first degree murder of a girl known only as Tammy.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, this 20 day of February, 1980.

WAYNE A. COBB, Circuit Judge

Copies furnished to:

Office of the State Attorney
Leonard J. Nolton, Esquire
Larry S. Hersch, Esquire

APPENDIX

Adams v. State, 341 So.2d 765 (Fla. 1976)

Aldridge v. State, 351 So.3d 942 (Fla. 1977)

Alford v. State, 307 So.2d 433 (Fla. 1975)

Alvord v. State, 322 So.2d 533 (Fla. 1975), cert. den. 96 S. Ct. 3234, 428 U.S. 923, 49 L. Ed. 2d 1226

Barclay v. State, 343 So.2d 1266 (Fla. 1977)

Barclay v. State, 362 So.2d 657 (Fla. 1978)

Brown v. State, 367 So.2d 616 (Fla. 1979)

Buckrem v. State, 355 So.2d 111 (Fla. 1978)

Burch v. State, 343 So.2d 831 (Fla. 1977)

Chambers v. State, 339 So.2d 204 (Fla. 1976)

Cooper v. State, 336 So.2d 1133 (Fla. 1976)

Darden v. State, 329 So.2d 287 (Fla. 1976), cert. den. 97 S. Ct. 1671, 430 U.S. 704, 51 L. Ed. 2d 751

Dobbert v. State, 328 So.2d 433 (Fla. 1976)

Dobbert v. State, 375 So.2d 833 (Fla. 1978)

Douglas v. State, 328 So.2d 18 (Fla. 1976)

Elledge v. State, 346 So.3d 998 (Fla. 1977)

Foster v. State, 369 So.2d 928 (Fla. 1979)

Funchess v. State, 341 So.2d 762 (Fla. 1976)

Furman v. Georgia, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972)

Gardner v. State, 313 So.2d 675 (Fla. 1975)

Gibson v. State, 351 So.2d 948 (Fla. 1977)

Good v. State, 365 So.2d 381 (Fla. 1979)

Halliwell v. State, 323 So.2d 577 (Fla. 1975)

Harvard v. State, 375 So.2d 833 (Fla. 1978)

Henry v. State, 328 So.2d 430 (Fla. 1976), cert. den. 97 S. Ct. 370, 429 U.S. 951, 50 L. Ed. 2d 319

Hoy v. State, 353 So.2d 826 (Fla. 1977)

Huckaby v. State, 343 So.2d 29 (Fla. 1977), cert. den. 98 S. Ct. 393, 434 U.S. 920, 54 L. Ed. 2d 276

Jackson v. State, 359 So.2d 1190 (Fla. 1978)

Jackson v. State, 366 So.2d 752 (Fla. 1978)

Jones v. State, 332 So.2d 615 (Fla. 1976)

Kampff v. State, 371 So.2d 1007 (Fla. 1979)

Knight v. State, 338 So.2d 201 (Fla. 1976)

Lamadlin v. State, 303 So.2d 17 (Fla. 1974)

LeDuc v. State, 365 So.2d 149 (Fla. 1978)

Lee v. State, 294 So.2d 305 (Fla. 1974), app. after remand 340 So.2d 474

McCaskill v. State, 344 So.2d 1276 (Fla. 1977)

Meeks v. State, 336 So.2d 1142 (Fla. 1976)

Meeks v. State, 339 So. 2d 186 (Fla. 1976)

Menendez v. State, 368 So.2d 1278 (Fla. 1979)

Messer v. State, 330 So.2d 137 (Fla. 1976)

Miller v. State, 332 So.2d 65 (Fla. 1976)

Miller v. State, 373 So.2d 882 (Fla. 1979)

Proffit v. Florida, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976)

Province v. State, 337 So.2d 783 (Fla. 1976), cert. den. 97 S. Ct. 2929, 431 U.S. 969, 53 L. Ed. 2d 1065

Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. den. 98 S. Ct. 153, 434 U.S. 847, 54 L. Ed. 2d 114

Raulerson v. State, 358 So.2d 826 (Fla. 1978)

Reino v. State, 352 So.3d 853 (Fla. 1977)

Riley v. State, 366 So.2d 19, (Fla. 1979)

Salvatore v. State, 366 So.2d 745 (Fla. 1979)

Slater v. State, 316 So.2d 539 (Fla. 1975)

Smith v. State, 365 So.2d 704 (Fla. 1978)

Songer v. State, 322 So.2d 481 (Fla. 1975), cert. granted 97 S. Ct. 1594,

Spinkellinch v. State, 313 So.2d 666 (Fla. 1975)

Spinkellinch v. Wainwright, C.A. 578 F.2d 582 (1978)

State v. Carroll, 287 So.2d 304 (Fla. 1973)

State v. Dixon, 283 So.2d 1 (Fla. 1973)

Swan v. State, 322 So.2d 485 (Fla. 1975)

Taylor v. State, 294 So.2d 648 (Fla. 1974)

Tedder v. State, 322 So.2d 908 (Fla. 1975)

Thomas v. State, 374 So.2d 508 (Fla. 1979)

Thompson v. State, 328 So.2d 1 (Fla. 1976)

Washington v. State, 362 So.2d 658 (Fla. 1978)

Witt v. State, 342 So.2d 497 (Fla. 1977)

FLORIDA STATUTES

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an

advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) Review of judgment and sentence.--The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have

priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

§ 90.801 Hearsay; definitions; exceptions

> (2) A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is: (a) Inconsistent with his testimony and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding or in a deposition.

§ 905.27 Testimony not to be disclosed; exceptions

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;
>
> (b) Determining whether the witness is guilty of perjury; or
>
> (c) Furthering justice.

SURVEY OF STATE RULES ON GRAND JURY TESTIMONY*/

I. STATES WHICH BROADLY ALLOW ACCESS, ONCE GRAND JURY WITNESS HAS TESTIFIED AT TRIAL

Pennsylvania: Commonwealth v. Brocco, 396 A.2d 1371 (Pa. Super. 1979)

Commonwealth v. Kelly, 369 A.2d 438 (Pa. Super. 1976), aff'd, 399 A.2d 1061 (Pa.), cert. denied and app. dismissed, 444 U.S. 947 (1979)

Massachusetts: Commonwealth v. Edgerly, 361 N.E.2d 1289 (Mass. 1977)

Commonwealth v. Liebman, 400 N.E.2d 842 (Mass. 1980)

Indiana: Gunn v. State, 365 N.E.2d 1234 (Ind. App. 1977)

Marlett v. State, 348 N.E.2d 86 (Ind. App. 1976) (when foundation laid and state gives "no valid reason for non-production," error to deny motion to produce)

Antrobus v. State, 254 N.E.2d 873 (Ind. 1970) (requires foundation that witness has testified on direct, that "substantially verbatim" transcript of grand jury statement "is shown to be probably within the control of the prosecution, and previous statements relate to witness's present testimony." 254 N.E.2d at 876-77)

Colorado: Parlapiano v. District Court In and For Tenth Jud. Dist., 491 P.2d 965 (Colo. 1971) (court should ordinarily grant motion to disclose grand jury testimony prior to trial, absent showing by

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*/ This Appendix reviews the apparent status of a defendant's access to grand jury testimony of witnesses in the 41 states in which controlling authorities were uncovered. It is not intended to be an exhaustive review of case law in each state but is intended as an aid to the Court.

district attorney that it should not be disclosed)

People Ex. Rel. Shinn v. District Court of and for the Fifteenth Jud. Dist., 469 P.2d 732 (Colo. 1970)

Norman v. People, 496 P.2d 1029 (Colo. 1972)

Michigan: People v. Duncan, 201 N.W.2d 629 (Mich. 1972)

People v. Wimberly, 179 N.W.2d 623 (Mich. 1970)

Iowa: State v. Gartin, 271 N.W.2d 902 (Iowa 1978)

State v. Cuevas, 282 N.W.2d 74 (Iowa 1979)

Oregon: State v. Hartfield, 624 P.2d 588 (Ore. 1981) (particularized need exists to test witness's credibility once a grant jury witness testifies at trial)

Arizona: State v. Casey, 460 P.2d 52 (Ariz. App. 1969) ("grand jury testimony must be made available to a defendant when a request therefor is made during the course of trial to cross examine a witness for purposes of impeachment, refreshing his recollection, or to test his credibility." 460 P.2d at 54.)

State Ex. Rel. Ronan v. Superior Court In and For County of Maricopa, 390 P.2d 109 (Ariz. 1964)

Illinois: People v. Lentz, 304 N.E.2d 278 (Ill. 1973)

People v. Johnson, 203 N.E.2d 399 (Ill. 1964)

Nevada: Shelby v. Sixth Judicial District Court, 414 P.2d 942 (Nev.), reh. denied, 418 P.2d 132 (1966)

California: People v. Sola, 200 Cal. App.2d 593, 19 Cal. Rptr. 327 (1962) (accused entitled by statute to copy of grand jury proceedings to prepare defense)

People v. Pipes, 179 Cal. App.2d 547, 3 Cal. Rptr. 814 (1960)

New Jersey: State v. Dimodica, 192 A.2d 825 (N.J. 1963)

State v. Cronin, 206 A.2d 914 (N.J. Super. 1965)

Kentucky: Faught v. Commonwealth, 467 S.W.2d 322 (Ky. 1970) (only when grand jury testimony is reported is defendant entitled to a copy of it on request)

Smith v. Commonwealth, 321 S.W.2d 786 (Ky. 1959)

New York: People v. Baker, 75 A.D.2d 966, 428 N.Y.S.2d 353 (1980)

People v. Renner, 80 A.D.2d 705, 437 N.Y.S.2d 749 (1981)

Gold v. Quinones, 37 A.D.2d 618, 325 N.Y.S.2d 294 (1971)

People v. Oldring, 42 A.D.2d 737, 346 N.Y.S.2d 14 (1973)

People v. Monahan, 21 A.D. 76, 249 N.Y.S.2d 562 (1964)

People v. Surita, 18 A.D. 1064, 239 N.Y.S.2d 405 (1963)

Connecticut: State v. Canady, 445 A.2d 895 (Conn. 1982) (statute enacted in 1981 on availability of transcript to accused to use for impeachment, attacking credibility or proving inconsistent statements; access only under general supervisory power of the court)

Oklahoma: English v. District Court of Adair County, 492 P.2d 1125 (Okla. Cr. 1972) (defendants had right under statute to grand jury testimony of witnesses who testified against them)

Cf: State Ex. Rel. Fallis v. Miracle, 494 P.2d 676 (Okla. Cr. 1972) (refusing to extend coverage of statute to defendants charged by information)

Minnesota: State v. Falcone, 195 N.W.2d 572, 576 n.8 (Minn. 1972) (defense attorney may discover grand jury minutes after presentment, citing Minn. St. § 628.04)

New Mexico: State v. Vigil, 516 P.2d 1118 (N.M. 1973) (no requirement of particularized need for defendant to obtain copy of grand jury testimony of witness who has "actually appeared and testified.")
State v. Felter, 515 P.2d 138 (N.M. 1973) (particularized need demonstrated by witness testifying at trial)

Vermont: Berard v. Moeykens, 326 A.2d 166 (Vt. 1974)
Vermont Rules of Criminal Procedure 16(a)(2)(B) (effective January 1, 1974 -- disclosure to defendant on request at appearance or later "the transcript of any grand jury proceedings pertaining to the indictment of the defendant or of any inquest proceedings pertaining to the investigation of the defendant.")

Kansas: Kansas Code of Criminal Procedure, K.S.A. 22-3212, 22-3213.
State v. Humphrey, 537 P.2d 155 (Kan. 1975) (discovery provisions of K.S.A. 22-3213 should be "liberally construed.")
State v. Campbell, 539 P.2d 329 (Kan.), cert. denied sub nom. Docking v. Kansas, 423 U.S. 1017 (1975) ("K.S.A. 22-3213 provides that no statement of a prospective state witness shall be subject to inspection until the witness

has testified at the preliminary hearing or on direct examination at trial." 539 P.2d at 351)

II. STATES WHICH ALLOW ACCESS ONLY ON SHOWING OF PARTICULARIZED NEED, DEMONSTRATED INCONSISTENCIES, OR JUDICIAL DISCRETION

Ohio: State v. Greer, 420 N.E.2d 982 (Ohio 1981)
State v. Morris, 329 N.E.2d 85 (Ohio 1975), cert. denied sub nom. McSpadden v. Ohio, 423 U.S. 1049 (1976)

Rhode Island: State v. Benoit, 363 A.2d 207 (R.I. 1976)
State v. Carillo, 307 A.2d 773 (R.I. 1973) (access not a matter of right but court should grant motion where defendant demonstrates particularized need)

South Dakota: State v. Kaseman, 273 N.W.2d 716 (S.D. 1978)

Florida: Nelson v. State, 362 So.2d 1017 (Fla. App. 1978)
Minton v. State, 113 So.2d 361 (Fla. 1959)

Maine: State v. Cugliata, 372 A.2d 1019 (Me.), cert. denied, 434 U.S. 856 (1977)
State v. Robbins, 318 A.2d 51 (Me. 1974)

Maryland: Silbert v. State, 280 A.2d 55 (Md. App. 1971)
Chester v. State, 363 A.2d 605 (Md. App. 1976)

Texas: Hoffpauir v. State, 596 S.W.2d 139 (Tex Cr. App. 1980)
McManus v. State, 591 S.W.2d 505 (Tex. Cr. App. 1980)
Martin v. State, 577 S.W.2d 490 (Tex. Cr. App. 1979)
Dyche v. State, 490 S.W.2d 568 (Tex. Cr. App. 1973)

Alaska: Merrill v. State, 423 P.2d 686, (Alaska), cert. denied, 386 U.S. 1040 (1967) (particularized need must be shown for defendant to inspect grand jury minutes -- absent here)

Missouri: State v. Guelker, 548 S.W.2d 521 (Mo. 1976), cert. denied, 431 U.S. 941, reh. denied, 434 U.S. 882 (1977) (review of grand jury testimony only in discretion of trial judge; in camera review showed inconsistencies on minor details between trial testimony and police report insufficient to permit inspection)

State v. Cusumano, 372 S.W.2d 860 (Mo. 1963) (wide discretion of trial court to permit inspection of grand jury testimony)

Tennessee: West v. State, 466 S.W.2d 524 (Tenn. Cr. App.), cert. denied, (Tenn. 1971) (no blanket discovery -- statute allows secrecy of grand jury proceeding to be invaded to "check upon the accuracy of a witness' subsequent testimony" or "whenever necessary to the attainment of truth and justice.")

Washington: State v. Beck, 349 P.2d 387 (Wash. 1960) (affirmed trial court decision by equally divided court), aff'd, Beck v. Washington, 369 U.S. 541 (1961), reh. denied, 370 U.S. 965 (1962) (defendant not entitled to copy of his testimony before grand jury as a matter of right -- "the extent to which such a transcript will be made available to him is within the sound discretion of the trial court." 349 P.2d at 396)

Utah: State v. Faux, 345 P.2d 186 (Utah 1959) (judicial discretion not abused in releasing copy of grand jury transcript to defendant prior to trial to prepare for impeachment of prospective witnesses)

Delaware: In Re Steigler, 250 A.2d 379 (Del. Sup. 1969) (disclosure of grand jury proceeding may be ordered by court "in circumstances where the interests of justice require it" -- bail case. 250 A.2d at 382)

Hawaii: McMahon v. Office of the City and County of Honolulu, 465 P.2d 549 (Hawaii 1970)("Even under a most restrictive view, it is clear that a defendant is under some circumstances entitled to some part of the grand jury transcript." 465 P.2d at 550)

III. STATES DENYING ACCESS, EXCEPT UNDER VERY LIMITED CIRCUMSTANCES

Arkansas: Arnold v. State, 20 S.W.2d 189 (Ark. 1929) (defendant in murder prosecution had no access to grand jury witness statements)

Alabama: Redus v. State, 398 So.2d 757 (Ala. App.), cert. denied, 398 So.2d 762 (Ala. 1981)
Brager v. State, 380 So.2d 401 (Ala. App. 1980)
Stroud v. State, 325 So.2d 200 (Ala. App. 1975), cert. quashed, 325 So.2d 204 (1976) (no error in refusing access unless State uses "to test recollection, to impeach, or unless contradiction is shown"; Alabama rejects Jencks)
Thigpen v. State, 270 So.2d 666 (Ala. App. 1972)
Sanders v. State, 179 So.2d 35 (Ala. 1965)

Louisiana:	State v. Sheppard, 350 So.2d 615 (La. 1977) State v. Martin, 376 So.2d 300 (La. 1979), cert. denied, 449 U.S. 998 (1980), reh. denied, 449 U.S. 1119 (1981)
New Hampshire:	State v. Purrington, 446 A.2d 451 (N.H. 1982) (improper for trial court to order transcription of grand jury proceedings, thus defendant not entitled to discovery of grand jury testimony) State v. Booton, 329 A.2d 376 (N.H. 1974), cert. denied, 421 U.S. 919 (1975) (grand jury minutes not transcribed, thus impossible to grant defendant's request for minutes)
North Carolina:	State v. Jones, 210 S.E.2d 454 (N.C. App. 1974), cert. denied, 214 S.E.2d 435 (N.C. 1975) (no error in denial of motion for transcript of grand jury testimony because such testimony not recorded in the state)
Idaho:	State v. Bullis, 472 P.2d 315 (Idaho 1970) (no error in trial court denying request to make transcript of grand jury testimony; secrecy of grand jury proceedings must be maintained)
Wisconsin:	State v. Krause, 50 N.W.2d 439 (Wis. 1951) Steensland v. Hoppmann, 252 N.W. 146 (Wis. 1933) (inspection of grand jury minutes only allowed "in the instances provided for by legislation and permitted by the courts when necessary to protect the rights of citizens in the administration of justice." 252 N.W. at 148)

SURVEY OF STATE LAWS ON JUDGE/JURY ROLES IN DEATH SENTENCE DETERMINATIONS

1. Jury Life Determination Binding

ARKANSAS	Crim. Code §§ 41-1301.-1302 (1977)	U
CALIFORNIA	Penal Code §§ 190.3-.4 (Supp. 1982)	U
COLORADO	Rev. Stats. § 16-11-103 (Cum. Supp. 1981)	U
CONNECTICUT	Gen. Stats. Ann. § 53a-46a (Supp. 1982)	C
DELAWARE	Code Ann. § 11-4209 (1979)	U
GEORGIA	Code Ann. § 17-10-31 (1982)	U
ILLINOIS	Ann. Stats. § 38-9-1 (Supp. 1982)	U
KENTUCKY	Rev. Stats. § 532.025 (1982)	U
LOUISIANA	Code of Crim. Proc. art. 905.8 (Supp. 1982)	U
MARYLAND	Ann. Code art. 27, § 413 (Cum. Supp. 1982)	U
MASSACHUSETTS	Ann. Code ch. 279, § 53 (1980)	U
MISSISSIPPI	Code § 99-19-101 (Cum. Supp. 1978)	U
MISSOURI	Crim. Code § 565.006 (Supp. 1982)	U
NEVADA	Rev. Stats. § 175.554 (1977)	N
NEW HAMPSHIRE	Rev. Stats. Ann. § 630.5 (Supp. 1981)	U
NEW JERSEY	Senate Bill No. 112 (1982)	U
NEW MEXICO	Stats. Ann. § 31-20A-3 (1982)	U
NORTH CAROLINA	Gen. Stats. § 15A-2000 (Cum. Supp. 1981)	U
OHIO	Rev. Code Ann. § 2929.03(D) (1982)	U
OKLAHOMA	Stats. Ann. § 21-701.11 (Supp. 1981-1982)	U
PENNSYLVANIA	Cons. Stats. Ann. tit. 42, § 9711 (Supp. 1982); Pa. R. Crim. P. 1120 (1982)	U
SOUTH CAROLINA	Code Ann. § 16-3-20 (Cum. Supp. 1981)	U
SOUTH DAKOTA	State Laws § 23A-27A-4 (1979)	U
TENNESSEE	Code Ann. § 39-2404 (Cum. Supp. 1981)	U
TEXAS	Code Crim. Proc. art. 37.071 (1981)	T
UTAH	Crim. Code § 76-3-207 (1978)	U
VIRGINIA	Code § 19.2-264.4 (Cum. Supp. 1979)	U
WASHINGTON	Rev. Code Ann. § 10.95.050-.080 (Supp. 1982)	U
WYOMING	Stats. § 6-4-102 (1981)	U

2. Jury Life Determination Not Binding

ALABAMA	1981 Acts, No. 81-178, §§ 8-9	A
FLORIDA	Stats. Ann. § 921.141 (Supp. 1982)	F
INDIANA	Stats. Ann. § 35-50-2-9 (1979)	U

3. Penalty Determination By Judges(s) Alone

ARIZONA	Rev. Stats. Ann. § 13-454 (Supp. 1978)
IDAHO	Code § 19-2515 (Cum. Supp. 1978)
MONTANA	Rev. Codes § 95.2206.6 (1977 Interim Supp.)
NEBRASKA	Rev. Stats. § 29-2520 (1975)

NOTATIONS

U--Unanimous jury determination required for death sentence
C--Connecticut procedure: Statute does not specify whether unanimous verdict required
N--Nevada procedure: If jury unable to agree on sentence, three-judge panel determines sentence; panel can only impose death sentence if three judges unanimously vote for death
T--Texas procedure: Penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim; 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence
A--Alabama procedure: 10 jurors required for death, 7 jurors required for life
F--Florida procedure: Simple majority suffices for verdict of either life or death

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 1982, a copy of this Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida was mailed, postage prepaid, to Michael J. Kotler, Assistant Attorney General of the State of Florida, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

Counsel for Petitioner

NO. 82-5590

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JIM SMITH
ATTORNEY GENERAL

MICHAEL J. MINERVA
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

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TABLE OF CITATIONS

CASE NO. 82-5590

IN THE

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ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

QUESTIONS PRESENTED

1. WHETHER THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION?

2. WHETHER THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY?

3. WHETHER THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT?

4. WHETHER RECENT DEVELOPMENTS RENDER FLORIDA'S JURY OVERRIDE OF LIFE SENTENCE UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED?

OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed by this petition is reported as Miller v. State, 415 So.2d 1262 (Fla. 1982).

JURISDICTION OF THE COURT

Respondent agrees that jurisdiction is properly invoked pursuant to 28 USC §1257(3) and the Court can exercise jurisdiction to the extent that a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

An indictment filed in the Circuit Court for Pasco County on August 29, 1979, charged Ernest Lee Miller and his step brother, William Jent, with the premeditated murder of a girl identified as "Tammy." Subsequent to their pleas of not guilty, they filed several pre-trial motions.

The court granted a State Motion to Sever and Miller proceeded to trial. He was convicted as charged. Jent proceeded to trial on December 17, 1979, and was also convicted as charged.

Subsequently, the court sentenced Miller and Jent to death. The court found as aggravating circumstances that: (1) the murder was especially heinous, atrocious and cruel, and (2) it was committed in a cold and calculated manner without any pretense of moral or legal justification. the Court fould in mitigation only that Miller had no significant history of prior criminal activity.

The Florida Supreme Court affirmed the lower court's judgment and sentence. Miller v. State, 415 So.2d 1262 (Fla. 1982).

STATEMENT OF THE FACTS

Respondent will rely on the facts as contained in the Florida Supreme Court opinions reported as Miller v. State, 415 So.2d 1262 (Fla. 1982) and Jent v. State, 408 So.2d 1024 (Fla. 1981). Respondent will also rely on the following facts from the record:

Miss C.J. Hubbard acknowledged that she had been drinking during the evening of the murder, however, a review of her testimony reveals that her recollection of the events that transpired was quite clear. Miss Hubbard was able to relate where she had been (R1168-1171); who she was with (R1171-1172,1181); and the events leading up to the murder (R1182-1192).

When Hubbard arrived at the river tressel, she went on a walk with John (R1182-1183). Shortly thereafter, Hubbard heard male screaming voices (R1183). Hubbard also heard the

fearful screams of a female (R1181). Hubbard paid no attention to this, because she simply figured the party was getting rowdy (R1183). When Hubbard and Johnny returned to where the others were swimming, Hubbard saw Miller and Jent beating a girl in the face (R1183-1184). After the beating, someone suggested that everyone leave (R1186). They got in Miller's car and drove to his house (R1186-1187). Afterwards, Samantha, Johnny, George, Trisha, Ricky, Glenna, Bill and Miller drove to another location in his car (R1188-1189). Miller and Bill jumped out of the car, went to the trunk (R1189) and shortly thereafter, Miller came back and told everyone to get out of the car (R1189). Patricia was extremely sick at the time (R1189). Hubbard looked over and saw Miller pour gasoline over the girl's body. The next thing she saw was the girl's body going up in flames (R1190).

While Miss Hubbard's story changed prior to trial, the reason is clearly apparent. Miss Hubbard was afraid of Miller and what he might do to her (R1208).

Miss Glenna Frye testified that on the evening of the murder she went to the river tressel with Miller (R1312-1317). Samantha, William Jent and Ricky were already there when she arrived (R1316). She and Miller went to Miller's house to get some crystal tea (R1317-1318). Miller lived very close to the river tressel (R1317). Glenna did not take any narcotics while she was there (R1317). When they returned to the river tressel, Glenna observed a marked police cruiser (R1318-1319). Glenna and Miller parked the car and walked 300 to 400 yards down to the tressel (R1320). When they reached the swimming hole, Miller told all the juveniles to leave (R1321).

Sometime thereafter, Glenna observed Samantha in a fight with another girl (R1321). The two girls were fighting over Jent (R1322,1363). The girl had come to the river tressel with two other people, however Glenna did not know how they

got there (R1322). Jent grabbed Samantha, threw her off the girl and started hitting the girl (R1323). Jent was punching Tammy in the face while Miller hit her with a stick (R1323-1324). Glenna had handed the stick to Miller at his request (R1323). Glenna complied out of fear (R1323,1328).

Tammy was struggling to get away when Glenna heard her scream out in pain. Blood was coming from Tammy's nose (R1371). Miller struck Tammy with the stick several times to the head (R1329). Glenna did not know whether Jent hit Tammy with the stick (R1368). Glenna did not attempt to intercede, out of fear (R1329). Glenna walked over to where the rest of the group was standing and when she turned around, Miller had stopped hitting Tammy (R1329-1330). Miller ordered Glenna to help him with the girl, but she refused (R1330). Miller then told Jent to help (R1330). Miller and Jent each grasped one of Tammy's arms and took her to the car (R1330). In the meantime, Miller had told Frye to start gathering up all their belongings (R1330). As they were leaving the tressel, they drove up to a van which was stuck in the sand (R1331). The driver of the van had walked up to the river tressel with Tammy (R1331,1355). After they helped to get the van out of the sand, the van made a right turn while the rest of the group went to the left to Miller's home (R1331,1332).

Samantha, Jent, George, Patricia, Ricky, George and Miller were all standing around while Tammy was being beaten (R1331). The two individuals from the van were also present (R1331). During the beating, Glenna heard Miller and Jent call the girl Tammy and she responded (R1332).

After stopping at Miller's house, everyone got back into his car, except for Ricky, who was passed out on the floor (R1332-1333). Miller drove to the Richloam Game Reserve in Lacoochee which was only a couple of miles from his home (R1333). Miller stopped the car and told everyone to get out. Everyone complied with his instructions and followed Miller to the rear of the car (R1333). Miller opened the trunk, picked

Tammy up by the arms while Jent picked her up by her legs (R1334). When Miller and Jent initially had put her in the trunk of the vehicle, Tammy was clothed, however, Glenna did not believe that Tammy was wearing anything when they took her out of the trunk at the Richloam Game Reserve (R1334). Miller and Jent then carried Tammy's body off to the front of the car (R1334). Samantha was carrying a container of gasoline (R1335). Glenna believed that she saw Miller pour the contents of the container (R1335). The next thing she saw was the girl's body burning (R1335). Miller, Jent and Samantha stood around the girl while she burned (R1335). Glenna was standing just behind them and C.J. Hubbard was just behind her (R2335). Patricia was screaming at the time (R3336). Glenna did not see who ignited the body because she was attempting to keep an eye on Patricia (R1336). Glenn identified State's Exhibit H as the girl known as Tammy who was beaten at the river tressel by Miller (R1336-1337). Glenna further testified that this was the same person who was set on fire at the Richloam Game Reserve (R1337).

ARGUMENT

ISSUE I

WHETHER THE REFUSAL OF STATE COURTS IN CAPITAL CASES TO PROVIDE GRAND JURY TESTIMONY OF PROSECUTION WITNESSES WHO HAVE GIVEN EXCULPATORY AND INCONSISTENT STATEMENTS -- AND WHOSE TESTIMONY FORMS THE BASIS FOR THE DETERMINATION OF GUILT AND SENTENCE OF DEATH -- PRESENTS AN IMPORTANT FEDERAL QUESTION?

This Court has long recognized the "long-established policy that maintains the secrecy of the grand jury proceedings in the federal courts." United States v. Proctor and Gamble Co., 356 U.S. 677, 681, 2 L.Ed 2d 1077,1081, 78 S.Ct. 983 (1958). Occasionally, limited inquiry is permitted and disclosure ordered relating to grand jury matters, but only when the movant has made a showing of "particularized need." Smith v. United States, 423 U.S. 1303,1304, 96 S.Ct. 2, 3, 46 L.Ed 2d 9 (1975); Dennis v. United States, 384 U.S. 855, 16 L.Ed 2d 973, 86 S.Ct. 840 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395, 400, 3 L.Ed 2d 1323, 1327, 79 S.Ct. 1237 (1959); United States v. Weinstein, 511 F.2d 622, 627 (2nd Cir. 1975), cert. denied, 422 U.S. 1042, 95 S.Ct. 2655, 45 L.Ed 2d 693 (1975). There are several interests served by safeguarding the confidentiality of the grand jury proceedings:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.
>
> For all of these reasons, courts have been reluctant to lift unnecessarily the veil of secrecy from the grand jury.

Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211,219, 60 L.Ed 2d 156, 99 S.Ct. 1667 (1979).

Under Rule 6(e), Federal Rules of Criminal Procedure,[1] parties seeking grand jury transcripts must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding, that the need for disclosure is greater than the need for continued secrecy and that their request is structured to cover only material so needed. Douglas Oil Co. v. Petrol Stops Northwest, supra at 441 U.S. 222. The rationale behind this rule was aptly stated by Judge Learned Hand in United States v. Garrison, 291 F. 646 (D.C. N.Y. 1923):

> "I am no more disposed to grant it than I was in 1909. United States v. Violon, C.C. 173 F. 501. It is said to lie in discretion, and perhaps it does, but no judge of this court has granted it and I hope none ever will. Under our criminal procedure, the accused has every advantage. While our prosecution is held rigidly to the charge, he need not disclose the barest outline of his defense. He is immune from question or comment on his silence: he cannot be convicted when there is the least fair doubt in the minds of any one of the twelve. Why in addition he should in advance have the whole evidence against him to pick over at his leisure and make his defense fairly or foully, I have never been able to see * * *"

Section 905.27(1), Florida Statutes (1979), provides in relevant part as follows:

> (1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of
>
> (a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

[1] Rule 6(e), Federal Rules of Criminal Procedure provides:

(e) Secrecy of Proceedings and Disclosure.

Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(b) Determining whether the witness is guilty of perjury; or

(c) Furthering justice.

(emphasis added)

Section 905.27(1) is entirely consistent with Federal Rule 6(3). It provides that a defendant does not have an absolute right to view a transcript of grand jury testimony. State v. Drayton, 226 So.2d 469 (Fla.2d DCA 1969). Except where a charge of perjury or subornation of perjury is based, an accused has no right to inspect, in advance of trial, the grand jury testimony of witnesses who will be called by the State to testify against him at trial. Minton v. State, 113 So.2d 881 (Fla. 1959). When the purposes of secrecy are accomplished and a disclosure becomes essential to the attainment of the truth, the rules of secrecy surrounding the grand jury proceedings may be released in the discretion of the court. Trafficante v. State, 92 So.2d 811 (Fla. 1957). Here, Petitioner's motion for leave to inspect the grand jury testimony was for the sole purpose of determining whether eyewitnesses testified at deposition as they did before the grand jury. Petitioner's motion was based on pure surmise and speculation. Petitioner's reference to Eddings v. Oklahoma, 102 S.Ct. 869 (1982) is misplaced. As the Florida Supreme Court aptly noted in Jent v. State, supra, defense counsel, through cross-examination was able to draw attention to the inconsistencies between each one's trial testimony and her previously given deposition. If, as defense counsel stated, he sought grand jury testimony in order to attack these witnesses' credibility, the cross-examination obviated the need for their prior testimony. The court also found that petitioner had failed to present a sufficient predicate.

Petitioner's reliance on United States v. Augenblick, 393 U.S. 348, 356 (1969) is also in error. This decision

concerns the administration of the Jencks Act. While this act provides that a government witness who testifies may be required to produce any statement which relates to his testimony, it is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. See Pittsburgh Plate Glass Co. v. United States, supra at 360 U.S. 375, 398.

Petitioner contends that Florida Courts have enacted an insurmountable barrier between a defendant and the grand jury proceeding. Petitioner's contention is ridiculous. Section 905.27(1), Florida Statutes presents no more of a barrier than its federal counterpart, Rule 6(e), Federal Rules of Criminal Procedure. Where a defendant fails to make a showing of particular need, the trial court should deny him access to the grand jury proceedings. No such showing was made.

ISSUE II

WHETHER THIS COURT'S DEATH PENALTY DECISIONS WERE WRONGLY CONSTRUED AS REQUIRING EQUALIZED DEATH SENTENCES FOR CO-PARTICIPANTS IN A MURDER -- NOTWITHSTANDING THE INDIVIDUAL DIFFERENCES OF PETITIONER OR THE RECOMMENDATION OF LIFE BY HIS JURY. . 2/

As ground two of the Certiorari petition, defense counsel argues that the trial court erroneously applied a "consistency doctrine" as an additional factor in sentencing Petitioner to death. Respondent would initially point out that this issue was not presented in this light in State court.

In Cardinale v. Louisiana, 394 U.S. 437, 22 L.Ed 2d 336, 89 S.Ct. 1162 (1969), this Court held that unless it appears on the record that a federal question was both raised and decided in the State court, this Court's appellate jurisdiction fails:

> ". . .It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809) and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet 368,391, 9 L Ed 458,467. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nichols, 4 Wheat 311, 315, 4 L Ed 578,579 (1819), and since, e.g. Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn, Inc., 360 US 334,342,n.7, 3 L.Ed 2d 1280,1286, 79 S.Ct. 1196 (1959): State Farm Mutual Automobile Insurance Co. v. Duel, 324 US 154,160-163,80 L.Ed 812, 817-819, 65 S.Ct. 573 (1945); McGoldrick v. Compagnie Generale Transatlantique, 309 US 430, 434-435,84 L.Ed 849,851-852, 60 S. Ct. 670 (1940); Whitney v. California,274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S.Ct. 641 (1927); Dewel v. Des Moines, 176 US 193, 197-201, 43 L.Ed 665,667-668,19 S. Ct. 379 (1899); Murdoch v. City of Memphis, 20 Wall 590, 22 L Ed 429 (1875 . . ."

2/ Petitioner states that the trial court found the existence of only one aggravating circumstance. Petitioner is in error. A review of the sentencing order reveals that the court found two aggravating circumstances to exist, (1) cold, calculated and premeditated, and (2) heinous, atrocious and cruel. (See Appendix 1-7).

See also Stanley v. Illinois, 405 US 645, 658, n.10, 31 L.Ed 2d 551, 92 S.Ct. 1208 (1972; Hill v.California, 401 US 797,28 L. 2d 484, 91 S.Ct. 1106 (1971).

Even if this Court were to determine that Petitioner has standing to make his arguments at this time, the petition for certiorari should still be denied. Florida's death penalty statute was approved by this Court in Proffitt v. Florida, 428 US 242, 49 L.Ed 2d 913, 96 S.Ct. 2960, reh. den. 429 US 875, 50 L Ed 2d 158, 97 S.Ct. 197, 198 (1976). Florida's sentencing procedure is based on a rational system of equal culpability - equal treatment where a variation between the defendants is minimal. Compare Barclay v. State, 343 So.2d 1266 (Fla.1977), cert denied 439 US 892 (1978). Contrary to counsel's observation the trial judge examined the individual characteristics of each defendant and in view of the jury recommendation gave greater weight to the mitigating circumstances in Miller's case, however he found their participation to be equally aggressive and malevolent without any substantive difference to distinguish the two defendants. He, therefore overrode the jury recommendation.

Peritioner emphasizes the doctrine of consistency far beyond *rational limits*. A simple review of the trial court's sentencing order reveals that "consistency" was not the motivation behind the imposition of the Petitioner's death sentence. This decision was reached only after an exhaustive examination of the individual facts and circumstances of each defendant. Petitioner's argument is totally without merit.

ISSUE III

WHETHER THE FLORIDA COURTS' EXCLUSION OF MITIGATING TESTIMONY, CONCERNING REHABILITATIVE CAPACITY, CONFLICTS WITH APPLICABLE DEATH PENALTY DECISIONS OF THIS COURT?

Under Florida law, the issue of whether a trial court erred in excluding defense witness testimony cannot be considered on appeal in the absence of a proffer in the trial court. Bennett v. State, 405 So.2d 265 (Fla 4th DCA 1981); Phillips v. State, 351 So.2d 739 (Fla 3d DCA 1977). Without such a showing it is impossible for the appellate court to determine whether the proposed evidence is admissible. Haager v. State, 83 Fla. 41, 90 So. 812 (Fla. 1922). Henry v. State, 81 Fla. 863, 89 So. 136 (Fla. 1921); Piccirrrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976); and Francis v. State, 308 So.2d 174 (Fla. 1st DCA 1975).

In the present case, defense counsel believed that Dr. Merin might testify as to rehabilitative capacity (R1444-1446). 3/ but he really wasn't sure. The trial judge responded, stating that he wasn't going to suppress any of the Doctor's testimony, because he did not know what it would be (R1546). While the trial judge later ruled that the witness was not to discuss rehabilitative capacity (R1568), Petitioner never attempted to develop this line of questioning by way of a proffer (R1582-1599). 4/

In Lockett v. Ohio, 438 US 586,604, 57 L.Ed 2d 973, 98 S. Ct. 2954 (1978), this Court held that the Eighth and Fourteenth Amendments require that the sentencer in a capital case not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

3/See Appendix 2.

4/See Appendix 3.

While evidence of rehabilitative capacity could be relevant to the mitigation of a death sentence, Gardner v. Florida, 430 U.S. 349, 360 (1977), there was no showing by Petitioner that Dr. Merin was competent to present any evidence on the subject. Since Petitioner never submitted a proffer of Dr. Merin's testimony on this subject, it cannot be said that the trial court erred.

ISSUE IV

WHETHER RECENT DEVELOPMENTS RENDER FLORIDA'S OVERRIDE OF LIFE SENTENCES UNCONSTITUTIONAL -- AT LEAST WHERE A STATUTORY MITIGATING FACTOR IS ESTABLISHED?

Petitioner complains because Florida's death penalty statute allows a trial court to impose a death sentence despite a jury recommendation of life imprisonment. At the risk of being repetitive, Respondent would again point out that the issue as framed was neither presented to, nor decided by the State courts of Florida. Clearly, Petitioner is without standing to present this issue. This Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. See Webb v. Webb, 451 U.S. 493, 68 L.Ed 2d 392, 101 S.Ct. 1889 (1981); Tacon v. Arizona, 410 U.S. 351, 352, 35 L.Ed 2d 346, 93 S.Ct. 998 (1973); Moore v. Illinois, 408 U.S. 786, 799, 33 L.Ed 2d 706, 92 S.Ct. 2562 (1972); University of California Regents v. Bakke, 438 U.S. 265, 57 L.Ed 2d 750, 98 S.Ct. 2733 (1978).

Even assuming Petitioner presented this issue to the state court (which he did not), his claim is meritless. This Court has already expressed approval of Florida's sentencing procedures in death penalty cases. See Proffitt v. Florida, supra and Dobbert v. Florida, 432 U.S. 282 (1977).

CONCLUSION

Based upon the foregoing reasons and authorities, Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Michael J. Kotler

MICHAEL J. KOTLER
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Suite 804
Tampa, Florida 33602
(813) 272-2670

Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U. S. Mail to Michael Sandler, Esquire, Steptoe and Johnson, 1250 Connecticut Avenue, N.W., Washington, D.C. 20036 on this the 24th day of November, 1982.

Michael J. Kotler

Of Counsel for Respondent

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PASCO COUNTY

CF79-847

STATE OF FLORIDA :
:
vs :
:
WILLIAM RILEY JENT; :
EARNEST LEE MILLER :

FINDINGS IN SUPPORT OF SENTENCES

On November 15, 1979, Earnest Lee Miller was convicted by a jury of the first degree murder of a girl known only as Tammy. That same jury recommended a life imprisonment sentence for Mr. Miller. On December 20, 1979, a different jury also convicted William Riley Jent of first degree murder in the same incident. That same jury recommended a death sentence for Mr. Jent.

It is now this Court's duty to sentence both Earnest Lee Miller and William Riley Jent for the first degree murder of a girl known only as Tammy.

In preparing to exercise that duty, this court carefully reviewed the Florida law relating to sentencing in capital cases (§921.141, Florida Statutes, and cases listed in appendix) and also carefully reviewed the application of the principles of the United States Constitution to sentencing in capital cases. Furman v. Georgia, 408 US 238, 33 L Ed 2d 346, 92 S Ct 2726 (1972); Proffitt v. Florida, 428 US 242, 49 L Ed 2d 913, 96 S Ct 2960 (1976); Dixon v. State, 283 So.2d 1 (Fla. 1973).

This court presided over the trials of both defendants. A pre-sentence investigation was not considered by this Court to offer any assistance in this case and was not requested. It is not required. Thompson v. State, 328 So.2d 1, 4 (Fla. 1976).

Florida law only allows two choices in imposing sentences for capital felonies: life imprisonment with a mandatory minimum service of 25 years before being eligible for parole, or death. §775.082, Florida Statutes.

The Florida Legislature has also established guidelines to control and direct the exercise of the sentencing court's discretion

in selecting and imposing the proper sentence in capital cases. §921.141, Florida Statutes. Under these guidelines, the Court must consider and weigh certain specified aggravating and mitigating circumstances.

From all of the evidence available, this Court finds the following aggravating circumstances to exist in this case:

1. §921.141(5)(h), Florida Statutes. This murder was especially heinous, atrocious and cruel. These two defendants, in concert, beat this girl to unconsciousness, loaded her into an automobile, drove her to an isolated home of the defendant Miller, took her out of the automobile still unconscious, stripped her of her clothing, threw her onto the trunk (or hood) of an auto, subjected her to rape by four men while requiring several other girls to watch, dumped her unceremoniously back into the trunk of an auto, drove her to a secluded spot in the Withlacoochee State Forest, drug her out of the auto trunk, carried her into the bushes, poured gasoline on her, beat her back down when she tried to get up, then immolated her and left her to the processes of final degradation--acts epitomical of "wicked," "shockingly evil," and "vile." Furthermore, these acts demonstrated the defendants to not only be pitiless, but the public gang rape of this victim during the perpetration of this murder demonstrated these defendants' enjoyment of the suffering of the nameless victim. Even the imagination of Hollywood at its most macabre is paled by the cruelty, the heinousness and the atrocity of this murder.

2. §921.141(5)(i), Florida Statutes. This crime was certainly committed by these two defendants in a cold, calculated and premeditated manner without any pretense of moral or legal justification. Counsel for the defendants argued that the defendants must have thought the girl was dead following the first beating on the bank of the Withlacoochee River and that the remainder of their atrocities were seemingly committed on a lifeless corpse. However, even ignoring the testimony during the trial of the defendant Jent that the girl tried

to sit up after the gasoline was poured on her, but before she was ignited. This Court cannot believe these defendants could for over an hour drag this girl in and out of automobiles, strip her clothes from her body and each rape her while she was lying on the trunk of an auto without realizing that she was warm, flexible and alive.

The conduct of the defendants was so callous in this case, however, that these two aggravating circumstances seem to blend into one.

None of the other aggravating circumstances are found to apply.

Having found aggravating circumstances to apply, the Court must consider any mitigating circumstances. Upon application of the available evidence in this case to the statutory mitigating circumstances, the Court finds as follows:

1. §921.141(6)(a), Florida Statutes. The defendants have no significant history of prior criminal activity. This mitigating circumstance applies to both defendants.

2. §921.141(6)(b), Florida Statutes. There was no evidence that this crime was committed while either defendant was under the influence of any mental or emotional disturbance. This mitigating circumstance does not apply to either defendant.

3. §921.141(6)(c), Florida Statutes. There was no evidence that the victim in this case was a willing participant in the defendants' conduct or consented to the acts culminating in her death. This mitigating circumstance does not apply to either defendant.

4. §921.141(6)(d), Florida Statutes. The defendants were accomplices in this crime but the participation of each defendant was equally aggressive and malevolant. Furthermore, no evidence indicated that either defendant acted under any duress or any domination of another person. At the sentencing phase of the trial of defendant Miller, Dr. Sidney Merin, a psychologist, did testify that Miller was a social follower. The jury may have been emotionally impressed with this personality appraisal. The jury recommended life imprisonment for Miller. But that appraisal does not square with he facts in

this case. The eyewitness' testimony indicated that each of these defendants tried to out-atrocity the other in killing this girl. This Court finds that neither of these mitigating circumstances applies to either of these defendants.

5. §921.141(6)(f), Florida Statutes. Dr. Merin testified that the defendant Miller had the capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of law. The evidence supports this appraisal for both Miller and Jent. They both knew the criminality of their conduct and were able to conform their conduct to the requirements of the law. The evidence indicates they enjoyed their heinous abandon. This mitigating circumstance does not apply to either defendant.

6. §921.141(6)(g), Florida Statutes. Jent was 28 years old and Miller 23 years old at the time of this crime. Both were of sufficient age that this mitigating circumstance does not apply to either.

After weighing the aggravating and mitigating circumstances existing in this case and comparing them to the circumstances found to be existing in most (if not all) of the death sentences reviewed by the Florida Supreme Court since 1972 (see appendix), this Court believes the aggravating circumstances of this case do outweigh the mitigating circumstances and a death sentence to be demanded for both defendants.

The jury that tried defendant Miller recommended life imprisonment for him. The Jent jury recommended death. In view of the Miller recommendation this Court is required to give "greater weight" to the mitigating circumstances for him. Beckren v. State, 355 So.2d 111 (Fla. 1978). That jury weighed and considered the same aggravating and mitigating circumstances that have been weighed by this Court. Although this Court is not bound by the advisory sentencing verdicts, they do represent a direct expression of the social conscience of an informed

the Constitutional standards espoused in Furman v. Georgia, supra, and Proffit v. Florida, supra, it is the judgment of this Court that both William Riley Jent and Earnest Lee Miller be put to death in the manner provided by Florida law for the first degree murder of a girl known only as Tammy.

DONE AND ORDERED in Chambers, Dade City, Pasco County, Florida, this 20 day of February, 1980.

WAYNE A. COBB, Circuit Judge

Copies furnished to:

Office of the State Attorney
Leonard J. Holton, Esquire
Larry S. Hersch, Esquire

[illegible] match, did he [illegible] you have any [illegible] before you [illegible] days he [illegible] match? Any [illegible] [illegible]ely none. [illegible] and ought to know he's not [illegible] with [illegible] ing a match. The State didn't [illegible] [illegible]d today [illegible] yesterday or the day before yesterday and say, [illegible] [illegible], you lit that match and you set that girl on fire. [illegible] not right. He's not charged with lighting that [illegible] he's charged with, and I've always [illegible]ed the [illegible], with participating in and being responsible for [illegible] murder. And here's why. There are other people [illegible]ved. There's a codefendant there, William Riley [illegible]. And there's another reason, ladies and gentlemen, [illegible] that reason is an instruction which I believe the [illegible] will give you that is called the principal [illegible] instruction and it stands for this proposition which was [illegible]ioned during voir dire, a person may commit a crime [illegible] his own personal act. Okay. Or through the act or [illegible] of another person. Any person. In other words, he [illegible] commit a crime through the act or acts of another [illegible] [illegible], counsels, [illegible] [illegible] or otherwise procures the commission of a crime [illegible] [illegible]ily guilty [illegible] the one who actually performs the [illegible] act, [illegible] or not present [illegible] commission [illegible] whether or not [illegible]. However [illegible] [illegible] will

...this to you ... the law, but I ... Judge's
... for one
... crime ... ...rted by
...er. It is necessary that he have a ... ...ous intent
...that the criminal act should be done and that
...ant to that intent he do some act or say some word,
...use a word ... which ... intended to
...often directly ... cause, encourage, assist or
... another person to actually commit the crime. Well
... and ... this defendant beat the girl. This
...dant carried her to his car with the help of Jene.
...defendant drove his car. This defendant went to
... house. This defendant drove Sandy to the Richloam
...reserve. This defendant, with Jene, carried the
... out of the car. This defendant pours gas on her
... this defendant was standing right there, right next
...Sandy, as you'll see in these pictures, you'll see
... in these pictures, right here is Sandy and standin
...and Jene and, according to the eyewitnesses, numbe
... - because ... Mr. C. J.
...
...ore ... state ... prove ... to you,
...beyond, ... a doubt, ... that ...
...that right ... is guilty. ... is
...ty, and the only, ... by or
...ple ... according right ... ...ered

[illegible] that is done by myself.

Q [illegible], you indicated you had a history [illegible]

A Yes.

Q [illegible] indicate his [illegible]

A Yes. Miller is [illegible] years of age.

Q And [illegible] his marital [illegible]

A Yes. He told me he was [illegible] that he had been separated from his wife for about the past year or so.

Q Did [illegible] indicate or did your notes indicate [illegible] Miller has any prior criminal activity?

A He told me that he had no prior legal difficulties.

Q Doctor Merin, with respect to your tests, [illegible] the results of those tests that you administered, [illegible] given any indication of Mr. Miller's propensity for violence?

A Yes.

Q Could you explain that to the jury?

A Yes. There are several characteristics in Mr. Miller that interested me and more or less surprised me [illegible] reviewed them. Mr. Miller's propensity for violence seems more from the climate and the people around him than [illegible] something innate or internal in himself. That is, if he surrounds himself or is surrounded by persons who are [illegible] or who are destructive or are violent [illegible] probability is very great that he will [illegible] those principles. On the other hand, if he principles himself

A

Q What tests were those?

A There [illegible] series of [illegible] including a clinical interview and the history [illegible] directly from Dr. [illegible] the Bender technique, [illegible] popularly known as the human figure [illegible] test; the [illegible] personality [illegible] the Peabody picture vocabulary test; the Bender Gestalt visual motor [illegible] the adult sentence completion test.

Q Sir, total hours, how long did you spend with Dr. Miller and how long did anyone with him spend?

A I spent approximately two hours with Dr. Miller and my assistant spent an additional two hours. Following that required perhaps another three hours for scoring and my interpretation of the examination.

Q With respect to your assistant, was that person giving some of these tests?

A Yes, the tests that I allow the assistant to give are simply those that require the -- really does not require anyone, perhaps be a ninth grade education. For test is simply to present to the subject a piece of paper and a pencil and the subject is told precisely what to put on the paper. That is, they're given instructions [illegible] the scoring of the test booklet and how to mark the [illegible] report is made on the part of my assistant to interpret [illegible]

MR. H[illegible]

Q Do you know one Earnest [illegible]?

A Yes,

Q Do you see him in the [illegible] today?

A Yes,

Q Could you please point to him, describe [illegible] what he's wearing?

A Yes. He's the man sitting over here to my right, has a light blue shirt on and what appears to be either light blue or gray trousers. He has blond straight hair.

MR. HERSCH: Thank you. Your Honor, may the record reflect that Doctor has identified the defendant, Earnest Miller?

THE COURT: Yes, sir.

MR. HERSCH:

Q Doctor, did you have occasion to come in contact with Earnest Miller?

A Yes, I have.

Q And when was that?

A That was on November 11th, 1979.

Q And where was that?

A That was in the Pasco County Jail here in [illegible].

Q And when you were in the Pasco County Jail here in [illegible] City, did you administer or cause to be administered any tests to him?

...ership as a full year in a mental hospital. And after ... he must be under the supervision of someone else for ... and at five ... before he can practice on his ... in psychology. So overall ... English may have ... in the undergraduate ... the use of psychological techniques, but not in the use ... drugs. The psychiatrist may have three or four years ... capable and qualified to use drugs.

Q Thank you, Doctor. Doctor, how many times have you ... certified in Court?

A Oh, perhaps six hundred to seven hundred times.

Q And were you qualified those times as an expert?

A Yes.

Q In what field were you qualified as an expert?

A In both criminal and civil situations in both state, ... county, juvenile and federal courts.

MR. FISCH: Your Honor, at this time I would tender Doctor Herin to the Court as an expert in the field of psychology and allow him to be able to give opinions with respect to his training.

THE COURT: Any objections or voir dire, Mr. Boyd?

MR. BOYD: No, sir.

THE COURT: Doctor Herin will be considered to be an expert in the field of psychology.

MR. FISCH: Thank you.

MR. [illegible] I'll stipulate [illegible] expertise. I'm familiar [illegible] free provide [illegible]

[illegible] you accept [illegible]

[illegible] No, sir.

[illegible] go ahead, Mr. [illegible]

[illegible]

Q Doctor Berlin, with respect to your professional [illegible] state your qualifications and education?

A Yes. I received my bachelor of science degree in psychology from the Pennsylvania State University and my master's degree in psychology from Temple University and my doctorate in psychology from the Pennsylvania State University. I served at the Elgin State Hospital in Illinois, came to Florida with the Child Guidance Clinic in Pinellas County from 1958 to 1959. And then from 1959 to 1960 I joined a group of psychologists in Tampa. And from 1960 to 1964 I was the chief psychologist for a group of psychiatrists in Tampa. From 1964 to the present time I have been in independent private practice. I'm an adjunct professor of psychology at the University of South Florida and have been an assistant clinical professor of psychiatry at the medical school at the University of South Florida. I was diplomated in clinical psychology [illegible] Professional Board of [illegible] have sat on the Florida State Board of [illegible] and I'm a past president [illegible]

[illegible]

A.UPON,

SIDNEY J. M[illegible]

[illegible] being first duly [illegible] examined and

[illegible] as follows:

MR. [illegible]: May it please [illegible]

THE COURT: Mr. Hersch.

DIRECT EXAMINATION

BY MR. HERSCH:

Q Would you state your name, please?

A Yes. Doctor Sidney J. Merin.

Q Before we go any farther with respect to your

[illegible] copy I would ask that pursuant to the rules

[illegible]

MR. [illegible]: Objection, Your Honor.

MR. HERSCH: Just [illegible] the witness so that

won't be a problem.

THE COURT: I thought that already happened.

MR. HERSCH: Yes, sir. I just wanted to remind him.

THE COURT: I don't think you need to do it.

MR. HERSCH: Fine.

BY MR. HERSCH:

Q Where do you live, Doctor?

A [illegible] Raisel, Tampa, Florida.

Q What is your profession?

A I'm a clinical psychologist.

examination. That is done by myself.

Q Doctor, you indicated you took a history from him?

A Yes.

Q Does it indicate his age?

A Yes. Mr. Miller is twenty-three years of age.

Q Indicate his marital status?

A Yes. He told me he was married, that he had been separated from his wife for about the past year or so.

Q Did it indicate or did your notes indicate whether Mr. Miller has any prior criminal activity?

A He told me that he had no prior legal difficulties.

Q Doctor Merin, with respect to your tests, within the results of those tests that you administered, were you given any indication of Mr. Miller's propensity for violence?

A Yes.

Q Could you explain that to the jury?

A Yes. There are several characteristics in Mr. Miller that interested me and more or less surprised me when I reviewed them. Mr. Miller's propensity for violence seems to stem more from the climate and the people around him than from something innate or internal in himself. Thereby, if he surrounds himself or is surrounded by persons who are antisocial or who are destructive or who are violent, the probability is very great that he will take on these characteristics. On the other hand, if he surrounds himself

No. 82-5590

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

ERNEST LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF

Michael Sandler
(Counsel of Record)

Charles G. Cole
Rebecca L. Hudsmith
Diane F. Orentlicher

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 862-2000

ATTORNEYS FOR PETITIONER

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REPLY BRIEF

ARGUMENT

1. Petitioner's position is that a substantial federal question is presented by the refusal of the courts below to grant access to -- or even conduct an in camera inspection of -- the grand jury testimony of the prosecution's two eye-witnesses in a death penalty case. Petitioner prior to trial had asserted a need for this grand jury testimony in view of the importance of the witnesses and the prior exculpatory and inconsistent statements they had given. Since the State's case on both guilt and sentence of death depended on the trial testimony of these two

witnesses, the withholding of their grand jury testimony from the accused rises to significant Eighth Amendment dimensions.

The State's response nowhere denies this proposition. Rather, the State simply reiterates its generalized interest in grand jury secrecy and recites the incantation of the trial court that petitioner failed to lay "a sufficient predicate" (i.e., a sufficient showing of particular need) for access to this grand jury testimony.

Regarding grand jury secrecy, the State's reliance on Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 (1979) is plainly inapposite. Response at 7. None of the considerations cited in Douglas Oil -- protecting witnesses against intimidation, maintaining the integrity of grand jury proceedings, preventing prospective defendants from fleeing, and safeguarding the reputation of persons ultimately exonerated by the grand jury -- has any application once, as in this case, an indictment has been issued and the defendant has been taken securely into custody. Moreover, the courts below did not rely on any of the Douglas Oil considerations in denying access here.

Nor do the older cases cited by the State (Response at 8) diminish the importance of the issue raised. To the contrary, those cases were decided prior to recognition of a state's constitutional duty to turn over material evidence favorable to an accused upon proper demand, Brady v. Maryland, 373 U.S. 83 (1963), or of the considerations that ultimately gave rise to a right of access to grand jury testimony in

federal courts, see Jencks v. United States, 353 U.S. 657 (1957).

Finally, the State asserts that petitioner's motion for access to the grand jury transcripts was based on "pure surmise and speculation." Response at 9. Yet, the State admits that one of the two eyewitnesses in question changed her story prior to trial (Response at 4) and does not deny that both eyewitnesses had given inconsistent and exculpatory statements before the motion for access to the grand jury transcripts was filed. The State's own rather disjointed statement of facts underscores the uncertainty as to what actually happened in this case. In these circumstances, the Eighth Amendment and basic principles of due process preclude a conviction and death sentence based on such testimony, where the accused has been denied relevant transcripts with which to challenge that testimony.

2. Contrary to respondent's assertion, the Florida Supreme Court considered and decided the issue of whether the United States Constitution requires equalized death sentences for petitioner and his co-defendant. In overriding the recommendation of life by petitioner's jury to achieve "consistency" with the co-defendant's death sentence, the trial court noted that "[t]he United States Supreme Court has determined that if the death penalty is to be imposed by the states, the United States Constitution demands that it be imposed with regularity, rationality and consistency." Petition at App. 24a. The Florida Supreme Court affirmed the sentence of death, expressly approving the trial court's decision to override the jury recommendation

of life in light of the "constitutional demand that the death penalty be imposed in a regular, rational, consistent manner." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982); Petition at App. 2a. By upholding the trial court's imposition of the death penalty as constitutionally demanded to avoid an unwarranted disparity in sentences, the Florida Supreme Court passed on petitioner's federal constitutional claim.[1/] Nothing more is required for this Court's exercise of its jurisdiction. Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914). Beyond this, the State does not dispute that the issue itself is worthy of certiorari.[2/]

3. The State asserts that petitioner failed to preserve his objection to the trial court's exclusion of mitigating testimony on rehabilitative capacity. Response at 13-14. The short answer to this contention is that the Supreme Court of Florida addressed the merits of this claim without relying on, or even mentioning, any such alleged

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1/ In Barclay v. Florida, No. 81-6908, cert. granted 51 U.S.L.W. 3362 (November 8, 1982) this Court will consider whether, in the absence of any mitigating circumstance, a trial judge's override of a jury recommendation of life may be sustained even though one or more aggravating circumstances may be invalid. In petitioner's case, this Court is asked to decide whether, in the presence of a statutory mitigating circumstance, the trial court may rely upon an additional nonstatutory factor (consistency with the sentence of a co-defendant) to override a jury recommendation of life.

2/ The State incorrectly asserts that petitioner misstated the number of aggravating circumstances the trial court found to apply. As set forth in the petition for writ of certiorari, and as supported by the record, the trial court found that the two aggravating circumstances blended into one and, accordingly, should be treated as one. Petition at 9 and at App. 11a-12a, 20a-21a.

procedural defect. 415 So.2d at 1263; Petition at App. 2a. As long as it is clear that the state supreme court reached and decided a federal question, this Court does not inquire into precisely how that federal question was raised below. See, e.g., Jenkins v. Georgia, 418 U.S. 153, 157 (1974); Raley v. Ohio, 360 U.S. 423, 436 (1959); Manhattan Life Insurance Co. v. Cohen, 234 U.S. 123, 134 (1914). Therefore, this issue is properly presented.[3/]

4. The State finally contends that petitioner did not sufficiently raise below his challenge here to the Florida procedure, as applied in petitioner's case, of overriding jury recommendations of life imprisonment in capital cases. Yet, the Florida Supreme Court did rule on the question of the constitutionality of the Florida jury override procedure as applied to this particular case. In a section of the appellate brief entitled "The Court Erred in Overruling the Jury's Advisory Sentence of Life Imprisonment," petitioner's counsel below at least touched on the issue that the rejection of the jury recommendation of life in the presence of mitigating circumstances did not in this case comport with the Constitution. Appellant's Brief at 48, citing Gardner v. Florida, 430 U.S. 349 (1977). More to the point, the Florida Supreme Court expressly upheld the jury override, while finding that a death sentence was constitutionally

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3/ Even if petitioner arguably failed to comply with the Florida requirements for preserving his objection, it is clear that state procedural rules may not operate in derogation of petitioner's due process rights under the Eighth and Fourteenth Amendments. See Green v. Georgia, 442 U.S. 95 (1979)(per curiam); Chambers v. Mississippi, 410 U.S. 284, 295-98 (1973).

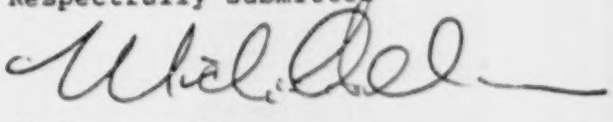
demanded to insure consistent imposition of the death penalty. 415 So.2d at 1263; Petition at App. 2a. In so doing, the court cited past cases in which it had upheld the constitutionality of Florida's jury override procedure. 415 So.2d at 1264; Petition at App. 3a.

As recently reiterated, this Court has broad discretion to interpret the scope of the state decision below in reviewing the imposition of a death penalty. Eddings v. Oklahoma, 455 U.S. 104, 114 n.9 (1982) ("Our jurisdiction does not depend on citation to book and verse."). This is particularly germane where the state court has repeatedly reaffirmed the death sentencing procedure at issue. In any event, the holding of the Florida Supreme Court in response to petitioner's challenge below to the jury override sufficiently provides this Court with jurisdiction.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Supreme Court of Florida.

Respectfully submitted



Michael Sandler
(Counsel of Record)

Charles G. Cole
Rebecca L. Hudsmith
Diane F. Orentlicher

STEPTOE & JOHNSON
Chartered
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of December, 1982, a copy of this Reply Brief On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Florida was mailed, postage prepaid, to Michael J. Kotler, Assistant Attorney General of the State of Florida, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602.

Counsel for Petitioner

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TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Florida Public
Defenders Association

Amicus Curiae

STATEMENT OF INTEREST OF AMICUS CURIAE

The Florida Public Defenders Association, Inc., is a non-profit Florida corporation created for an educational and public purpose comprising the elected Public Defenders of each of the twenty judicial circuits of the State of Florida, and their appointed assistants, who are charged under the State Constitution and law with the responsibility of providing legal representation to indigent criminal defendants. Article V, Section 18, Florida Constitution. Section 27.58, Florida Statutes (1981), provides that "the public defender of each judicial circuit of the state shall be the chief administrator of all public defender services within the circuit

whether such services are rendered by the state or county public defenders."

The Association itself does not provide actual representation in individual cases but coordinates, for the purpose of improving, the work of the Public Defenders in providing the actual legal representation. The Association does participate as amicus curiae on relevant legal issues where it has acquired significant expertise by virtue of its members discharging their responsibility under state law.

The issue amicus has addressed concerns whether the Constitution prohibits a state trial jury's decision of life imprisonment from being overridden by the trial judge who imposed a death sentence notwithstanding

the jury's decision.

Consent to the filing of an amicus curiae brief appears not to be required under Rule 36.4, as it is filed by, and on behalf of, the Association, comprising Florida's Public Defenders. The written consent of the petitioner, whose petition is supported by amicus, has been lodged with the Clerk. The respondent has withheld its consent. A motion for leave to file follows next herein in the event it is deemed necessary.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Florida Public Defenders Association, Inc., a non-profit Florida corporation, respectfully seeks leave to file its brief as amicus curiae. Pursuant to Rule 36.1 it is shown that the brief of amicus curiae has been prepared by the Florida Public Defenders Association, Inc., a non-profit, voluntary organization of Public Defenders, and their assistants, in the twenty judicial circuits of the State of Florida. The Public Defenders are constitutional and state officers under Florida law who are charged with the responsibility of representing indigent criminal defendants in the State of Florida.

The brief of amicus curiae

supports the position of the petitioner, who has supplied written consent to filing of the amicus curiae brief, although consent to the filing may not be required by Rule 36.4. The respondent has withheld its consent.

The interest of amicus is to present the issue of whether specific provisions of the Constitution bar a state from overruling of a jury's finding of fact, under instruction of law, that death is not the appropriate sentence. The amicus, because of the unique nature of the practice, has become especially knowledgeable of the issue. (See Appendix B).

Amicus presents considerations relevant to the Court's determination of the cause because amicus has extensively studied the question as a result of its

members discharging their responsibility under state law. Because of this experience, participation by amicus will aid the concise consideration of the questions before the Court that are relevant to disposition of the petition which the individual parties otherwise would be unable to do.

Wherefore, amicus curiae respectfully requests leave to file its brief as amicus curiae in this cause.

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OTHER AUTHORITIES

SUMMARY OF ARGUMENT

Under the procedure utilized in Florida, a trial judge may override a jury's finding made at the penalty phase of trial that death is not the appropriate sentence. Amicus urges review of the question whether a death sentence may be imposed by a trial judge in such case under Bullington v. Missouri, 451 U.S. 430 (1981).

The overwhelming national practice under post-Furman capital penalty statutes rejects such death sentences. The national concensus has rejected such death sentences for at least thirty years as is demonstrated in the appendices to the brief of amicus.

A comparison between capital versus non-capital sentencing supports the contention that when a jury has

been provided, and returns a verdict favorable to the accused on a factual issue essential to the sentencing decision, that Bullington v. Missouri, supra, requires finality of that decision. The Court, having granted certiorari review in Estelle v. Bullard, Case No. 81-1774, should also consider the application of Bullington's principles to the Florida practice.

Regardless of whether a jury's consent may be constitutionally required for imposition of a death sentence, as well it might under the analysis of McKeiver v. Pennsylvania, 403 U.S. 528 (1971), the imposition of the death sentence contrary to the decision of a jury involves federal constitutional questions of special

importance to the fair administration of the death penalty which should be settled by this Court.

STATEMENT OF AMICUS CURIAE REGARDING WHY THE WRIT OF CERTIORARI SHOULD BE ISSUED TO REVIEW QUESTIONS PRESENTED BY THIS CASE

In Kepner v. United States, 195 U.S. 100 (1904), Justice Brown stated, dissenting:

> Under our Anglo-Saxon system of jurisprudence I have always supposed that a verdict of acquittal upon a valid indictment terminated the jeopardy, that no further proceedings for a review could be taken either in the same or in an appellate court, and that it was extremely doubtful whether even Congress could constitutionally authorize such review.

In this case the Court is being asked to decide whether the State of Florida may empanel a jury to determine facts on which the life or death of the accused will depend and may then overturn the jury's findings of fact that death is not the appropriate

punishment.

This case presents the unique issue of whether a state legislature may now compromise the integrity of a jury deciding life or death in a manner which Justice Brown doubted that Congress could authorize in trials of guilt or innocence.

In Bullington v. Missouri, 451 U.S. 430 (1981), this Court clearly established that a comparison of the determination of guilt with the determination of life or death is not a mere poetic metaphor. As this Court stated in unequivocal and unqualified language, see 451 U.S. at 445:

> A verdict of acquittal on the issue of guilt or innocence is, of course, absolutely final. The values that underlie this principle... are equally applicable when a jury has rejected the

> State's claim that the defendant deserves to die....

Under the procedure utilized in Florida, "the statute leaves the trial judge free to reject the jury's recommendation, (and) the Florida Supreme Court has developed a strict standard of review in cases where a judge imposes the death penalty in the face of a jury recommendation favoring life imprisonment." Proffitt v. Wainwright, ___F.2d___, slip opinion at 2700 n. 11 (11th Cir. Case No. 80-5997 September 10, 1982), citing to Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In Tedder, id., the standard was iterated, viz.:

> In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually

no reasonable person could differ.

Such a legal fiction must erode society's trust in both the legitimacy of death penalty decisions and the inviolability of the jury system.[1] Invasion of the fact finding and weighing function of the jury is what is occurring in determinations in Florida on one of the most sensitive issues a jury can be called upon to make in our system of justice. A

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1. The impossibility of impeaching a jury verdict for the accused is a basic fact of our system. See, e.g., United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (the court "cannot search the minds of the jurors to find the basis upon which they judge."); McDonald v. Pless & Winborne, 238 U.S. 264 (1915) (jurors may not impeach their own verdict). See also, United States v. Crouch, 566 F.2d 1311, 1315-1316 (5th Cir. 1978), and United States v. D'Angelo, 598 F.2d 1002, 1004 (5th Cir. 1979).

disproportionate impact of the procedure has been demonstrated by the six-year study reported by L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (paper prepared at the University of North Florida), summarized in S. Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68, n. 318 (1980). (See Appendix A, attached hereto.)

In view of Bullington's equation of guilt and penalty phases of a capital trial, it is notable that the actual tendency of trial judges to exercise their power in favor of death, rather than in favor of life, is strikingly parallel to the inclination of judges to convict where a jury would acquit rather than vice versa. A

study referred to with approbation in Duncan v. Louisiana, 391 U.S. 145 (1968), at 157 nn. 24 and 26, revealed very similar jury-judge disagreement on the issue of guilt. Appendix A shows that the jury functions at capital penalty trials in Florida very much as the jury functions at the guilt phase of criminal trials. In Ballew v. Georgia, 435 U.S. 223 (1978), this Court utilized purely experimental simulations of jury behavior in interpreting the constitutional integrity of a criminal jury. Id. at 231-239 and nn. 10, 32.

In this case, however, Florida has actually become a living laboratory proving the hypothesis that the power to overrule a jury's decision for the accused is the power to

disproportionately impose the death penalty contrary to the will of the community itself which was expressed by the verdict of the jury.

In authorizing the override of a jury's decision against death, Florida departs from a near-unanimous national practice of finality for such jury decisions. (See Appendix B, attached hereto.) This national concensus has persisted over at least the past thirty years when at no time since 1948 have more than three American jurisdictions authorized the rejection of a jury's determination for mercy in a capital case. Under the clear precedent of this Court, constantly reiterated in recent death penalty decisions, such overwhelming national rejection of a procedure for imposing

the ultimate penalty must at least raise serious doubts as to its constitutionality.[2]

The invalidity of Florida's procedure is further indicated by the extreme infrequency of actual executions after jury recommendations for mercy even in the few states

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2. Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368 (1982) (death sentence unconstitutional for defendant who neither took nor intended to take human life); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty disproportionate for rape of adult where life not taken); Roberts v. Louisiana, 428 U.S. 325 (1976) (mandatory death sentence rejected by overwhelming national tradition). See also, Duncan v. Louisiana, supra, (jury trial clause interpreted in light of national practice), and McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (jury trial not required in juvenile cases under due process clause when great majority of states reject such procedure in delinquency determinations).

which have permitted such a practice.[3] In addition to the Utah cases shown in Appendix C, knowledgeable commentators have stated that under the pre-1963 New York law, trial judges almost "invariably" followed jury recommendations of mercy. See Togman, The Two-Trial System in Capital Cases, 39 N.Y.U.L. Rev. 50, 75 n. 171 (1964). The death sentence left intact in Williams v. New York, 337 U.S. 241 (1949), was commuted to life based in part on the jury's recommendation.

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3. See Appendix C, attached hereto, and Enmund v. Florida, supra, (extreme infrequency of executions of defendants who neither took nor intended to take life indicates unconstitutionality); Furman v. Georgia, 408 U.S. 238 (1972) (extreme infrequency of executions indicates arbitrariness of results when death penalty applicable to broad categories of homicide for which juries rarely impose it).

See Message of the Governor of New York, November 16, 1949, N.Y. Leg. Doc. (1950) no. 10, pp. 13-14, quoted in Michael and Wechsler, Criminal Law and Its Administration (1956 Supp.) 55.

The Florida Supreme Court has interpreted Furman to require the overruling of juries. See Douglas v. State, 373 So.2d 895, 897 (Fla. 1979), where the court held that finality of jury life determinations would "place our statute in contravention of the directives of the United States Supreme Court." This misunderstanding of Furman persists even after the decision in Lockett v. Ohio, 438 U.S. 586, 599-600, nn. 7-8 (1978), where restriction of consideration of mitigating factors was held to be unconstitutional. See Johnson v.

State, 393 So.2d 1069, 1074 (Fla. 1980):

> [A]cceptance of defendant's assertion would place our present death penalty statute in contravention of the United States Supreme Court's directives in Furman..., since to accept his argument would mean that a trial judge and this Court would be bound by the jury's recommendation of life.

The Petitioner, Ernest Miller, was sentenced to death "notwithstanding the jury's recommendation" because the trial court concluded "that Miller clearly deserved the death penalty." Miller v. State, 415 So.2d 1262, 1263 (Fla. 1982). In its affirmance the Florida Supreme Court held, id. at 1264:

> The standard set out in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), has been met in this case. On the totality of the circumstances virtually no reasonable person could differ on the appropriateness of the death penalty. See Johnson v. State, 393 So.2d

> 1069 (Fla. 1980). We agree that the disparity in the recommended sentences is not warranted. See Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892, 99 S.Ct. 249, 58 L.Ed.2d (1978).

Yet, in Johnson v. State, supra, the Florida Supreme Court divided four to three on whether reasonable persons could differ, with Chief Justice Sundberg stating the view, id. at 1075, that reasonable persons could conclude it was not the type of crime for which the death penalty is applicable. Moreover, in Barclay v. State, 343 So.2d 1266 (Fla. 1977), Justice Boyd stated that the jury "was correct", id. at 1272, not merely reasonable in assessing the relative circumstances in that case.

The Fifth Circuit has observed in Spinkellink v. Wainwright, 578 F.2d 582, at 605 (5th Cir. 1978) that:

> [R]easonable persons can differ over the fate of every criminal defendant in every death penalty case.

When Florida's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the state, not the defendant, that should bear "almost the entire risk of error", see Bullington at 446, such necessarily uncertain speculation as to the "reasonableness" of a jury's decision against the state's power of death seems utterly inappropriate. In a decision where society's vital concern demands the appearance as well as the reality of fairness, it seems shocking for the Florida Supreme Court to brand a jury's recommendation based on findings of fact against death as "unreasonable" when members of that tribunal differ among themselves on the ultimate issue,

as indeed reasonable people may differ in every capital case.

Based upon precepts established by this Court, it is not necessary to establish a requirement for jury participation in capital sentencing in order to constitutionally safeguard the integrity of a jury where a state has provided for a jury by law and has participated in selecting the citizens who pass upon the sentencing issues. See Taylor v. Louisiana, 419 U.S. 522 (1975) (state cannot compromise a jury which the state has purported to provide); Bullington v. Missouri, supra, (jeopardy final when jury proceeding resulted in verdict favorable to accused although it was not necessary to reach the question reserved in Lockett, supra, at 609 n. 6, of whether jury

participation is constitutionally required in capital penalty decisions).

When Florida itself purports to provide a penalty phase jury acting as "the conscience of our communities", McCaskill v. State, 344 So.2d 1276, at 1280 (1977), it is "but a short step" to expect the same absolute finality for a jury's decision in favor of the life of the accused that applies in trials of guilt. See Witherspoon v. Illinois, 391 U.S. 510, 521 (1968).[4]

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4. Neither Proffitt, nor Dobbert v. Florida, 432 U.S. 282 (1977), directly address nor decide issues crucial to the question now before the Court. In Proffitt v. Florida, 428 U.S. 242, at 254 n.11 (1976), it was explained that "the claims of vagueness and overbreadth in the statutory criteria" were reviewed only as necessary to determine whether the system in its entirety presented a substantial risk of arbitrariness. Also in Zant v. Stephens, ___U.S.___, 102 S.Ct. 1856 (1982), it was noted that the review of the

This Court has granted certiorari to review a similar question in Estelle v. Bullard, Case No. 81-1774, decided by the Fifth Circuit Court of Appelas in Bullard v. Estelle, 665 F.2d 1347 (1982). The present case, unlike Bullard, involves the application of principles applied in Bullington to death penalty proceedings, and it would be appropriate to grant certiorari in the present case to consider this question.

While in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), this Court rejected a jury trial requirement in

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4. (con't) statute in Gregg "did not lead us to examine all of its nuances." 102 S.Ct. at 1857. Likewise in Dobbert, the Court reviewed an ex post facto question.

juvenile delinquency cases, the Court articulated some important considerations in deciding whether trial by jury is required in various types of proceedings under the Sixth Amendment or by the Fourteenth Amendment Due Process clause. While McKeiver may well indicate a constitutional requirement for jury participation and consent in the decision to impose the death penalty, at the very least it strongly suggests that overturning a jury's sworn findings of fact against the death penalty violates due process.

In rejecting the jury trial requirement in McKeiver for delinquency proceedings, the Court repeatedly emphasized the benevolent, rehabilitative, non-punitive and

paternalistic nature and goals of the juvenile process. No more stark contrast to the juvenile justice system could exist than the administration of capital punishment in its utter rejection of rehabilitation. See Lockett v. Ohio, supra, at 604-605, and Gardner v. Florida, 430 U.S. 349, at 356 (1977). The juvenile system, by its benevolent approach, minimizes the risk for abuse while allowing for public opinion and periodic re-evaluation of an offender's treatment to correct any potential excess, yet the death penalty's exclusion of such corrective mechanisms indicates the need for absolute finality when a jury has rejected the irrevocable punishment of death.

CONCLUSION

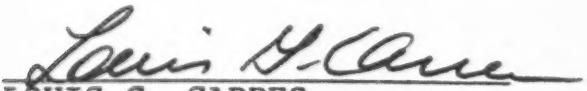
This Court in Parsons v. Bedford, 3 Pet. 433, at 446 (1830), has stated that:

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.

Since these momentous issues, which are of special importance in light of Bullington v. Missouri, supra, have not beenresolved as they pertain to the Florida practice, amicus believes a writ of certiorari should issue to review these questions of crucial importance to the fair administration of the ultimate sanction of death.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender



LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of
Florida
224 Datura Street/13th Floor
West Palm Beach, Florida
33401
(305) 837-2150

Counsel for Amicus Curiae:
Florida Public Defenders
Association

CERTIFICATE OF SERVICE

I, LOUIS G. CARRES, do hereby certify that service of three (3) true copies hereof, including the appendix, has been made upon all parties required to be served, by depositing same in the U.S. Mail, postage prepaid, addressed to:

(1) Michael Sandler, Esq.
Steptoe & Johnson
Attorneys at Law
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Attorney for Petitioner

and by U.S. Mail, postage prepaid, addressed to:

(2) Michael J. Kotler, Esq.
Assistant Attorney General
Park Trammell Building, 8th Floor
1313 Tampa Street
Tampa, Florida 33602
Attorney for Respondent

this 16th day of November, 1982.

LOUIS G. CARRES
Attorney for Amicus Curiae

JUDGE/JURY CAPITAL PENALTY DISAGREEMENT
IN 21 FLORIDA COUNTIES
1972-1978

When Judge and/or Jury Find(s) For Death Penalty in percentages

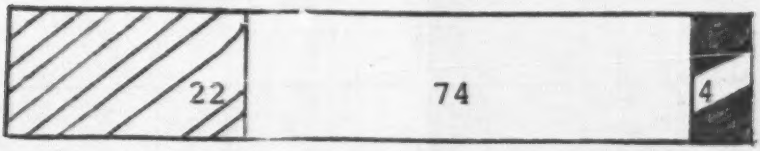
	28	66	6
Jury:	life	death	death
Judge:	death	death	life

NOTE: This chart is based on a survey of all 79 cases in 21 of the 67 Florida counties during the period 1972-1978 where the penalty jury and/or the trial judge reached a verdict or sentence of death. The data is reported in L. Foley, Florida After the Furman Decision: Discrimination in the Imposition of the Death Penalty (unpublished paper at the University of North Florida), and is summarized in S.Gillers, Deciding Who Dies, 129 U. of Penn. L. Rev. 1, 67-68 n. 318 (1980).

This data does not include cases where the accused waived a penalty jury.

Table 10

Judge-Jury Disagreement on Issue of Guilt
When either or both convict
in percentages

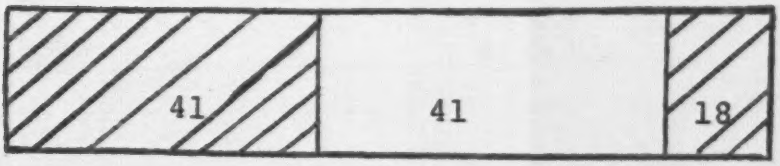


Jury:	not guilty	guilty	guilty
Judge:	guilty	guilty	not guilty
		Judge and Jury Disagree	

Source: H. Zeisel, Some Data on Juror Attitudes Towards Capital Punishment 36 (1968). Table based on survey of trial judge's hypothetical verdict if (s)he had tried case alone (where jury was actual trier of guilt or innocence). Data based on both capital and noncapital cases studied in H. Kalven, Jr. and H. Zeisel, The American Jury (1966).

Table 11

Judge-Jury Disagreement on the Death Penalty
When either or both impose it
in percentages



Jury:	prison	death	death
Judge:	death	death	prison
	Judge and Jury Disagree		

Source: H. Zeisel, Some Data on Juror *Attitudes Towards Capital Punishment* 37 (1968). Table based on survey of trial judge's hypothetical verdict on penalty if (s)he had tried case alone, in capital cases where jury was trier of fact and had discretion to choose between death and imprisonment.

JUDGE/JURY ROLES IN CAPITAL PENALTY DETERMINATION

A Survey of National Legislative Practice
1972-1981

1. Jury Life Verdict Binding

ARKANSAS	Crim. Code (1977) §41-1301 & §41-1302	L
CALIFORNIA	Penal Code (1979) §190.3-190.4	U
COLORADO	Rev. Stats. (1979 Cum.Supp.) §16-11-103	L
CONNECTICUT	Gen. Stats. Ann. (1979 Pck.Pt.) §53a-46a	U
DELAWARE	Code Ann. (1977 Cum.Supp.) §11-4209	L
GEORGIA	Code Ann. (1977) §26-3102, §27-2302	L
ILLINOIS	Ann. Stats. (1979) §38-9-1	L
KENTUCKY	Rev. Stats. (1978 Cum.Supp.) S532.025 #	U (?)
LOUISIANA	Code of Crim. Proc. (Pck.Pt. 1979) Art. 905.8	L
MARYLAND	Ann. Code (1978 Cum.Supp.) Art. 27, §413	L
MASSACHUSETTS	1979 Chapter 488, §55	L
MISSISSIPPI	Code (1978 Cum. Supp.) §99-19-101	L
MISSOURI	Crim. Code (1979 Spec. Pamph.)	L

MISSOURI (con't)	§565.006	
NEVADA	Rev. Stats. (1977) §175.554	U
NEW HAMPSHIRE	Rev. Stats. Ann. (1977 Supp.) §630.5	L
NEW MEXICO	Stats. Ann. (1979 Supp.) 31-20A-3	L
NORTH CAROLINA	Gen. Stats. (1978) §15A-2000	L
OHIO	Rev. Code (1981 Legislation, File 60) §2929.024(D)(2)	L
OKLAHOMA	Stats. Ann. (1978-1979 Pck.Pt.) §21-701.11	L
PENNSYLVANIA	Act No. 1978-141: §18-1311	L
SOUTH CAROLINA	Code. Ann. (1978 Cum.Supp.) §16-3-20	L
SOUTH DAKOTA	State Laws 1979 Chapter 160: S23A-27A-4	L (?)
TENNESSEE	Code Ann. (1978 Cum.Supp.) §39-2404	L
TEXAS	Code Crim.Proc.Art. 37.071	T
UTAH	Crim. Code (1978) §76-3-207	L
VIRGINIA	Code (1979 Cum. Supp.) §19.2-264.4	L

WASHINGTON	Rev. Code Ann. (1978 Pck.Pt) §10.94.020	U (?)
WYOMING	Stats. (1977) §6-4-102	L
UNITED STATES	49 USC §1473 (1976) (Antihijacking Act)	U

2. Jury Life Verdict Not Binding

ALABAMA	Senate Bill 241, §§8-9 (1981)	A
FLORIDA	Stats. Ann. (1977) §921.141	M
INDIANA	Stats. Ann. (1979) §35-50-2-9	U

3. Penalty Determination by Judge(s) Alone

ARIZONA	Rev. Stats. Ann. (1978 Supp. Pamph) §13-454
IDAHO	Code (1978 Cum. Pck.Supp.) §19-2515
MONTANA	Rev. Codes (1977 Unterim Supp.) §95-2206.6
NEBRASKA	Rev. Stats.(1975) §29-2520
OREGON	Rev. Stats. (1979) §163.116 *

LEGENDS AND NOTATIONS

L---Life sentence unless jury unanimously agrees on death
U---Unanimous verdict required for

either life or death
M---Simple majority suffices for verdict of either life or death
A---Alabama system: 10 jurors required for death, 7 jurors required for life

T---Unique Texas procedure: penalty jury answers special questions on deliberate nature of murder, probability defendant would engage in future acts of dangerous violence, and (if raised) lack of provocation by victim. 12 jurors required to answer "yes" to each question for imposition of a death sentence; 10 jurors suffice to answer any question "no" and prevent death sentence.

The Kentucky statute is not absolutely clear in its language concerning the finality of a jury decision against death, but in Gall v. Commonwealth, 607 S.W.2d 97, 104 (Ky. 1980) the Supreme Court of Kentucky construed the statute to require a jury finding of at least one aggravating circumstance in the penalty phase before the judge may consider imposing the death penalty. Since the statute calls for written findings of aggravating circumstances by the jury only "if its verdict be a recommendation of death," see Kentucky Rev. Stats. (1978 Cum.Supp.) §532.025 (3), it appears that a jury life decision is in effect binding under the Kentucky scheme.

* Oregon death penalty statute declared unconstitutional by the Supreme Court of Oregon in State v. Quinn, 623 P.2d 630 (or. 1981) on ground that "deliberateness" of capital murder a fact to be determined by the trial judge alone in the penalty phase denied an accused the right to trial by jury.

(?) The Kentucky statute as interpreted by the Supreme Court of Kentucky requires a unanimous jury verdict for death, but the consequences of a jury's failure to agree on the penalty issue are not defined. The Connecticut and South Dakota statutes do not specifically state a unanimity requirement on penalty, but it is fairly assumed; the Washington statute does not specify the result if the jury fails to agree on the penalty issue.

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OVERALL CATEGORIES

JURY LIFE VERDICT BINDING----------	29
JURY LIFE VERDICT NOT BINDING---------	3
PENALTY DETERMINED BY JUDGE(S) ALONE--	5
TOTAL JURISDICTIONS	37

PRACTICES WHERE JURIES PARTICIPATE IN DETERMINING PENALTY

JURY RESULT FOR LIFE IMPRISONMENT BINDING ----------	29
JURY RESULT FOR LIFE IMPRISONMENT NOT BINDING ----------	3
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

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RULES ON JURY PENALTY VOTE

LIFE IMPRISONMENT UNLESS JURY UNANIMOUS FOR DEATH (L)	22
UNANIMITY REQUIRED FOR EITHER LIFE OR DEATH (U)	7*
10 JURORS REQUIRED FOR DEATH, 7 FOR LIFE (A)	1*
SIMPLE MAJORITY SUFFICES FOR LIFE OR DEATH (M)	1*
TEXAS PROCEDURE--SPECIAL PENALTY QUESTIONS (T)	1
SUBTOTAL OF JURISDICTIONS WITH JURY PARTICIPATION	32

*(U) includes Indiana (life decision not binding); (A) includes only Alabama (life not binding); (M) includes only Florida (life not binding). However, the majority rule in Florida is not connected with the nonbinding nature of a life decision under the 1972 statute, since during the period 1872-1972 the same majority rule prevailed but the jury's life decision was final under state law.

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METHOD OF STUDY: This survey includes the latest discretionary death penalty statute passed in each jurisdiction since Furman v. Georgia, 408 U.S. 238 (1972).

THIS SURVEY BASED ON BEGISLATIVE INFORMATION AVAILABLE TO DECEMBER 22, 1981

UTAH EXECUTIONS AND DEATH SENTENCES
JURY RECOMMENDATIONS

Previous to the decision of Furman v. Georgia, 408 U.S. 238 (1972), the State of Utah had a death penalty statute which made the ultimate penalty mandatory unless the jury recommended mercy, and in cases where the jury did recommend mercy extended discretion to the trial judge to impose a penalty of death or of life imprisonment. It may be noted that under Utah law death was the normal penalty for first degree murder, and life imprisonment the exception which thus required agreement by both judge and jury.

There follows a list of every defendant whose death sentence was executed in Utah between 1948 and 1967 (when a moratorium on executions began which was to last nationwide for 10 years

while federal constitutional questions were being resolved).

Also, there are listed reports of two Utah cases (in 1941 and 1951) where a death sentence was sustained by the Utah Supreme Court after a jury recommendation of mercy, but was not carried out.

The records show that at least since 1948, there were no executions in Utah after jury recommendations of mercy.

DEFENDANTS EXECUTED IN UTAH
1948-1967

Name - Date of Verdict	Dist.Ct.# and Appellate Report
1. Mares, Elisio J. Executed - 9/10/51 Verdict - March 7, 1947	Summit Cnty. 3rd Dist.Ct. #420 State v. Mares, 192 P.2d 861 (Ut. 1948)

Name - Date of Verdict	Dist.Ct.# and Appellate Report
2. Gardner, Ray Dempsey - Executed - 9/29/51 Verdict - Dec. 13, 1949	Weber Cnty. 2nd Dist.Ct. #4803 State v. Gardner, 230 P.2d 559 (Ut. 1951)
3. Neal, Don Jesse Executed - 7/1/55 Verdict - (see note)	(see note) State v. Neal, 262 P.2d 756, 759 (Ut. 1953) Utah S. Ct. noted lack of jury mercy recommendation id. at 759.
4. Braasch, Vern A. Executed - 5/11/56 Verdict - Dec. 9, 1949	Iron Cnty. 5th Dist.Ct. #171 State v. Braasch, 229 P.2d 289 (Ut. 1951)
5. Sullivan, Melvin L. Executed - 5/11/56 Verdict - Dec. 9, 1949	Same as Braasch (co-defendant) Sub nomine Braasch
6. Kirkham, Barton K. Executed - 6/7/58 Verdict - (see note)	(see note) State v. Kirkham, 319 P.2d 859, 862 (Ut. 1958). Absence of jury mercy recommendation

6.	Kirkham (con't)	noted in opinion, id. at 862.
7.	Rodgers, James W. Executed - 3/30/60 Verdict - Dec. 14, 1957	San Juan Cnty. 7th Dist. Ct. Crim. #243 State v. Rodgers, 329 P.2d 1075 (Ut. 1958)

NOTE: In two cases, those of Neal and Kirkham, the opinion of the Utah Supreme Court itself mentions the choice of the jury for a verdict of first degree murder without rather than with a recommendation of mercy; thus only the appellate citation is given for these cases. Information on the other five cases was obtained from the relevant Judicial District Courts of Utah, where the defendants were tried. In each of these cases, trial records revealed a jury verdict of first degree murder without recommendation for mercy. This is especially striking because customarily Utah juries were provided with separate verdict forms for each possible decision, including guilty of first degree murder with a recommendation for life imprisonment.

DEFENDANTS WITH DEATH SENTENCES AFFIRMED IN UTAH AFTER LIFE RECOMMENDATIONS WHO WERE NEVERTHELESS NOT EXECUTED (THIS LIST IS NOT NECESSARILY EXHAUSTIVE, ALTHOUGH THERE IS NO SPECIFIC INDICATION THAT OTHER CASES EXIST).

Name	Appellate Opinion Aff'g Sentence & Date Commuted
1. Markham, John	State v. Markham, 112 P.2d 496, see 496-497 (Ut. 1941). June, 1941
2. Matteri, Fred	State v. Matteri, 225 P.2d 325, see 329-330 (Ut. 1950). June 11, 1951

NOTE: Commutation dates based on records of Utah State Prison, which also confirm that the list of executions taken above from Bowers, Executions in America 385 (1974) is in fact accurate and complete. The records merely say "commuted," giving no details. However, the Utah State Archives are now researching for the existence of any public clemency documents in these cases.